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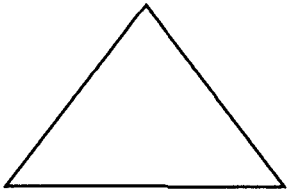

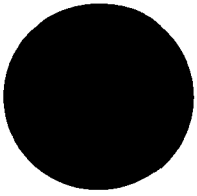

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Toward a New World Order: Introduction to Carl Schmitt's "The Land Appropriation of a New World"

Gary Ulmen

The end of the Cold War and of the bipolar division of the world has posed again the question of a viable international law grounded in a new world order. This question was already urgent before WWI, given the decline of the *ius publicum Europaeum* at the end of the 19th century. It resurfaced again after WWII with the defeat of the Third Reich. If the 20th century is defined politically as the period beginning with the "Great War" in 1914 and ending with the collapse of the Soviet empire in 1989, it may be seen as a long interval during which the question of a new world order was suspended primarily because of the confrontation and resulting stalemate between Wilsonianism and Leninism. Far from defining that period, as claimed by the last defenders of Left ideology now reconstituted as "anti-fascism," and despite their devastating impact at the time, within such a context fascism and Nazism end up automatically redimensioned primarily as epiphenomenal reactions of no lasting historical significance. In retrospect, they appear more and more as violent geopolitical answers to Wilsonianism's (and, to a lesser extent, Leninism's) failure to establish a new world order.

Both the League of Nations and the United Nations have sought to reconstitute international law and the *nomos* of the earth, but neither succeeded. What has passed for international law throughout the 20th century has been largely a transitory semblance rather than a true system of universally accepted rules governing international behavior. The

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geopolitical paralysis resulting from the unresolved conflict between the two superpowers created a balance of terror that provided the functional equivalent of a stable world order. But this state of affairs merely postponed coming to terms with the consequences of the collapse of the *ius publicum Europaeum* and the need to constitute a new world order. What is most significant about the end of the Cold War is not so much that it brought about a premature closure of the 20th century or a return to the geopolitical predicament obtaining before WWI, but that it has signaled the end of the modern age — evident in the eclipse of the nation state, the search for new political forms, the explosion of new types of conflicts, and radical changes in the nature of war. Given this state of affairs, today it may be easier to develop a new world order than at any time since the end of the last century.

At the beginning of the 20th century, Ernest Nys wrote that the discovery of the New World was historically unprecedented since it not only added an immense area to what Europeans thought the world was but unified the whole globe.[1] It also resulted in the European equilibrium of land and sea that made possible the *ius publicum Europaeum* and a viable world order. In his "Introduction" to *The Nomos of the Earth,* Carl Schmitt observes that another event of this kind, such as the discovery of some new inhabitable planet able to trigger the creation of a new world order, is highly unlikely, which is why thinking "must once again be directed to the elemental orders of concrete terrestrial existence."[2] Despite all the spatial exploration and the popular obsession with extra-terrestrial life, today there is no event in sight comparable to the discovery of a New World. Moreover, the end of the Cold War has paved the way for the further expansion of capitalism, economic globalization, and massive advances in communication technologies. Yet the imagination of those most concerned with these developments has failed so far to find any new alternatives to the prevailing thinking of the past decades.

Beyond the Cold War

The two most prominent recent attempts to prefigure a new world order adequate to contemporary political realities have been made by Francis

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1. Ernest Nys, "Introduction" to Franciscus de Vitoria, *De indis et de ivre belli relectiones* — part of *Relectiones Theologicae* XII, Ernest Nys, ed. (Washington: Carnegie Institution, 1917), pp. 64-65.

2. Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950), 2nd ed. (Berlin: Duncker & Humblot, 1974), p. 6.

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Fukuyama and Samuel P. Huntington.[3] Fukuyama thinks the West has not only won the Cold War but also brought about the end of history, while Huntington retreats to a kind of "bunker mentality" in view of an alleged decline of the West.[4] While the one suffers from excessive optimism and the other from excessive pessimism, both fail primarily because they do not deal with the "elemental orders of concrete terrestrial existence" and both remain trapped in an updated version of Wilsonianism assuming liberal democracy to be the highest achievement of Western culture. While Fukuyama wants to universalize liberal democracy in the global marketplace, Huntington identifies liberalism with Western civilization. But Huntington is somewhat more realistic than Fukuyama. He not only acknowledges the impossibility of universalizing liberalism but exposes its *particularistic* nature. Thus he opts for a defense of Western civilization within an international *bellum omnium contra omnes*. In the process, however, he invents an "American national identity" and extrapolates from the decline of liberal democracy to the decline of the West.

Fukuyama's thesis is derived from Alexandre Kojève's Heideggerian reading of Hegel and supports the dubious notion that the last stage in human history will be a universal and homogeneous state of affairs satisfying all human needs. This prospect is predicated on the arbitrary assumption of the primacy of *thymos* — the desire for recognition — which both Kojève and Fukuyama regard as the most fundamental human longing. Ultimately, according to Fukuyama, "Kojève's claim that we are at the end of history . . . stands or falls on the strength of the assertion that the recognition provided by the contemporary liberal democratic state adequately satisfies the human desire for recognition."[5] Fukuyama's own claim thus stands or falls on his

3. Fukuyama's article "The End of History" in *The National Interest* (Summer 1989), stirred enough debate to encourage him to write *The End of History and the Last Man* (New York: Avon Books, 1993). Similarly, Huntington first published an article titled "The Clash of Civilizations?" in *Foreign Affairs*, Vol. 72, No. 3 (Summer 1993), pp. 22-49, which caused enough discussion (see, for example, "Responses to Samuel P. Huntington's 'The Clash of Civilizations?' in *Foreign Affairs*, Vol. 72, No. 4 [September/October 1993], pp. 2-27) to lead him to write *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Shuster, 1996).

4. In his penetrating critique of Huntington, William H. McNeill points out that: "Retreat into a local cultural past — even when it is a reconstructed past that never existed before — can indeed sustain local morale and cohesion in times of troubles. But when the resulting bunker mentality dictates a systematic disregard of, or deliberate inattention to the ideas and skills alien peoples have at their command, the end result is to be disastrously left behind by the rest of the world." See his "Decline of the West?" in *The New York Review of Books* (January 9, 1997), p. 21.

5. Fukuyama, *The End of History*, *op. cit.*, p. 207.

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assumption that at the end of history "there are no serious ideological competitors to liberal democracy."[6] This conclusion is based on a whole series of highly dubious ideological assumptions, such as that "the logic of modern natural science would seem to dictate a universal evolution in the direction of capitalism"[7] and that the desire for recognition "is the missing link between liberal economics and liberal politics."[8]

According to Fukuyama, the 20th century has turned everyone into "historical pessimists."[9] To reverse this state of affairs, he challenges "the pessimistic view of international relations . . . that goes variously under the titles 'realism,' *realpolitik*, or 'power politics'."[10] He is apparently unaware of the difference between a pessimistic view of human nature, on which political realism is based, and a pessimistic view of international relations, never held by political realists such as Niccolò Machiavelli or Hans Morgenthau — two thinkers Fukuyama "analyzes" in order to "understand the impact of spreading democracy on international politics." As a "*prescriptive* doctrine," he finds the realist perspective on international relations still relevant. As a "*descriptive* model," however, it leaves much to be desired because: "There was no 'objective' national interest that provided a common thread to the behavior of states in different times and places, but a plurality of national interests defined by the principle of legitimacy in play and the individuals who interpreted it." This betrays a misunderstanding of political realism or, more plausibly, a deliberate attempt to misrepresent it in order to appear original. Although he draws different and even antithetical conclusions, Fukuyama's claim is not inconsistent with political realism.[11]

Following this ploy, Fukuyama reiterates his main argument that: "Peace will arise instead out of the specific nature of democratic legitimacy, and its ability to satisfy the human longings for recognition."[12] He is

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6. *Ibid.*, p. 211.
7. *Ibid.*, p. xv.
8. *Ibid.*, p. 206.
9. *Ibid.*, p. 3.
10. *Ibid.*, p. 246.
11. For example, in the "Six Principles of Political Realism" introducing his most famous work, Morgenthau writes: "Realism does not endow its key concept of interest defined as power with a meaning that is fixed once and for all"; "The same observations apply to the concept of power. Its content and the manner of its use are determined by the political and cultural environment." See Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 3rd ed. (New York: Alfred A. Knopf, 1960), pp. 8 and 9 respectively.
12. *Ibid.*, p. 279.

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apparently unaware of the distinction between legality and legitimacy, and of the tendency within liberal democracies for legality to become its own mode of legitimation.[13] Even in countries in which legality remains determined independently by a democratic legislative body, there is no reason to believe it will be concerned primarily or at all with satisfying any "human longing for recognition"; rather, it will pursue whatever goals the predominant culture deems desirable. Consequently, it does not *necessarily* follow that, were democratic legitimacy to become universalized with the end of the Cold War, international conflict would also end and history along with it. Even Fukuyama admits that: "For the foreseeable future, the world will be divided between a post-historical part, and a part that is still stuck in history. Within the post-historical part, the chief axis of interaction between states would be economic, and the old rules of power politics would have decreasing relevance."[14]

This is nothing more than the reconfiguration of a standard liberal argument in a new metaphysical guise: the old historical world determined by politics will be displaced by the new post-historical world determined by economics. Schmitt rejected this argument in the 1920s: according to liberals, the "concept of the state should be determined by political means, the concept of society (in essence nonpolitical) by economic means," but this distinction is prejudiced by the liberal aversion to politics understood as a domain of domination and corruption resulting in the privileging of economics understood as "reciprocity of production and consumption, therefore mutuality, equality, justice, and freedom, and finally, nothing less than the spiritual union of fellowship, brotherhood, and justice."[15] In effect, Fukuyama is simply recycling traditional liberal efforts to eliminate the political[16] — a maneuver essential for his thesis of the arrival of "the end

13. The distinction between legality and legitimacy is essential for understanding Fukuyama's confusion. Schmitt argued that the parliamentary state's closed system of legality had developed into its own justification and that this legality was directed against the "legitimacy" not only of monarchs but of any higher authority. In this he followed Max Weber who had argued that "this legality can pass for legitimacy" and that "the most familiar contemporary form of legitimacy is the belief in legality." Thus, both legitimacy and legality merge into a "common concept of legitimacy." See Carl Schmitt, *Legalität und Legitimität* (1932), 2nd ed. (Berlin: Duncker & Humblot, 1968), pp. 13-14.

14. *Ibid.*, p. 276.

15. Carl Schmitt, *The Concept of the Political*, tr. with an Introduction by George Schwab (Chicago: University of Chicago Press, 1996), p. 76.

16. For a critique of how another prominent contemporary liberal, Friederick von Hayek, prefigures this development along roughly similar lines, see Alain Benoist, "Hayek: A Critique," forthcoming in *Telos*.

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of history" with the end of the Cold War. Accordingly: "The United States and other liberal democracies will have to come to grips with the fact that, with the collapse of the communist world, the world in which they live is less and less the old one of geopolitics, and that the rules and methods of the historical world are not appropriate to life in the post-historical one. For the latter, the major issues will be economic."[17] Responding to Walter Rathenau's claim in the 1920s that the destiny then was not politics but economics, Schmitt said "what has occurred is that economics has become political and thereby the destiny."[18]

For Fukuyama, the old historical world is none other than the European world: "Imperialism and war were historically the product of aristocratic societies. If liberal democracy abolished the class distinction between masters and slaves by making the slaves their own masters, then it too should eventually abolish imperialism."[19] This inference is based on a faulty analogy between social and international relations. Not surprisingly, Fukuyama really believes that "international law is merely domestic law writ large."[20] Compounded with an uncritical belief in the theory of progress and teleological history, this leads him to generalize his own and Kojève's questionable interpretation of the master-slave dialectic (understood as the logic of all social relations) to include international relations: "If the advent of the universal and homogeneous state means the establishment of rational recognition on the level of individuals living within one society, and the abolition of the relationship of lordship and bondage between them, then the spread of that type of state throughout the international system of states should imply the end of relationships of lordship and bondage *between* nations as well — i.e., the end of imperialism, and with it, a decrease in the likelihood of wars based on imperialism."[21] Even if a "universal and homogeneous state" were possible today, in an age when all nation-states are becoming ethnically, racially, linguistically and culturally heterogeneous, it is unclear why domestic and international relations should be isomorphic. Rather, the opposite may very well be the case: increasing domestic heterogeneity is matched by an increasingly heterogeneous international scene where "the other" is not regarded as an equal but as "a paper tiger," "the Great Satan," "religious fanatics," etc.

17. Fukuyama, *The End of History*, *op. cit.*, p. 283.
18. Schmitt, *The Concept of the Political*, *op. cit.*, p. 78.
19. Fukuyama, *The End of History*, *op. cit.*, p. 260.
20. *Ibid.*, p. 281.
21. *Ibid.*, p. 245.

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At any rate, imperialism for Fukuyama is not a particular historical phenomenon which came about because of the discovery of the New World at the beginning of the age of exploration by the European powers. Rather, it is seen as the result of some metaphysical ahistorical "struggle for recognition among states."[22] It "arises directly out of the aristocratic master's desire to be recognized as superior — his *megalothymia*."[23] Ergo: "The persistence of imperialism and war after the great bourgeois revolutions of the eighteenth and nineteenth centuries is therefore due not only to the survival of an atavistic warrior ethos, but also to the fact that the master's *megalothymia* was incompletely sublimated into economic activity."[24] Thus the formal market relation between buyer and seller, both reduced to the level of the hyper-rational and calculating *homo oeconomicus*, comes to displace the master-slave dialectic whereby, miraculously, the interaction between these economic abstractions generates as much recognition as anyone would want, rendering conflict obsolete and putting an end to history.

In terms of Fukuyama's own formulation, the real end of history, as he understands it, is not even close. In his scenario, since there are still a lot of unresolved conflicts between the historical and the post-historical worlds, there will be a whole series of "world order" problems and "many post-historical countries will formulate an abstract interest in preventing the spread of certain technologies to the historical world, on the grounds that world will be most prone to conflict and violence."[25] Although the failure of the League of Nations and the UN has led to the general discrediting of "Kantian internationalism and international law," in the final analysis, despite his Heideggerian Hegelianism, Fukuyama does not find the answer to the end of history in Hegel, Nietzsche or even Kojève,[26] but

22. *Ibid.*, p. 256.
23. *Ibid.*, p. 259.
24. *Ibid.*, p. 266.
25. *Ibid.*, p. 278.
26. At least in the short run, Kojève entertained no Panglossian vision of the end of history. In a recently published manuscript, dated August 27, 1945, when he was working as a French diplomat, Kojève projects a postwar structure of the world in terms resembling Schmitt's conception of *Grossräume* outlined in 1941, i.e., federations of states each dominated by a hegemonic power and subscribing to some fundamental principles. See Alexandre Kojève, "L'Empire Latin. Esquisse d'une doctrine de la politique francaise (27 Aout 1945)," in *La regle du jeu*, Vol. 1, No. 1 (May 1990), pp. 89-123. See also Michael Roth, *Knowing and History: The Resurgence of French Hegelianism from the 1930s through the Post-War Period* (Princeton: Princeton University Press, 1988); Dominique Auffret, *Alexandre Kojève. La philosophie, l'etat, la fin d l'histoire* (Paris: Grasset, 1990); and Alain de Benoist, "The Idea of Empire," in *Telos* 98-99 (Winter 1993-Spring 1994), pp. 81-98.

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rather in Kant, who argued that the gains realized when man moved from the state of nature to civilization were largely nullified by wars between nations. According to Fukuyama, what has not been understood is that "the actual incarnations of the Kantian idea have been seriously flawed from the start by not following Kant's own precepts," by which he means that states based on republican principles are less likely than despotisms to accept the costs of war and that an international federation is only viable if it is based on liberal principles.

Although Huntington has a much better grasp of international relations than Fukuyama, his decline of the West scenario is equally unconvincing. The central theme of his book is that "culture and cultural identities, which at the broadest level are civilization identities, are shaping the patterns of cohesion, disintegration, and conflict in the post-Cold War world."[27] But whereas Fukuyama couches his thesis in terms of a universal desire for *recognition*, Huntington couches his thesis in terms of a global search for *identity*: "Peoples and nations are attempting to answer the most basic question humans can face: Who are we?"[28] The result is a "multipolar and multi-civilizational" world within which the West should abandon its presumed universalism and defend its own particular identity: "In the clash of civilizations, Europe and America will hang together or hang separately. In the greater clash, the global '*real* clash,' between Civilization and barbarism, the worlds great civilizations . . . will also hang together or hang separately. In the emerging era, clashes of civilizations are the greatest threat to world peace, and an international order based on civilizations is the surest safeguard against world war."[29]

In Huntington's new world, "societies sharing civilizational affinities cooperate with each other."[30] Leaving aside his cavalier blurring of the differences between cultures, civilizations and societies, what does Huntington regard as the essence of Western particularism? Here he is ambiguous: he first mentions Christianity, then some secular residues of Christianity, but when he adds up the civilizational core of the West it turns out to be none other than liberalism. As Stephen Holmes points out, it is "the same old ideology, plucked inexplicably from the waste-bin of history, that once united the West against Soviet Communism."[31] But Huntington

27. Huntington, *The Clash of Civilizations*, *op. cit.*, p. 20.
28. *Ibid.*, p. 21.
29. *Ibid.*, p. 321.
30. *Ibid.*, p. 20.
31. See Stephen Holmes, "In Search of New Enemies," in *London Review of Books* (April 24, 1997), p. 8.

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also claims that the West had a distinct identity long before it was modern (since he insists that modernization is distinct from Westernization, so that non-Western societies can modernize without Westernizing, thus retaining their civilizational distinctiveness). In this case, however, the West cannot really be identified with liberalism, nor can its heritage be equated *sic et nunc* with "American national identity." While liberalism may very well be declining, this need not translate into a decline of the West as such. Similarly, if "American national identity" is threatened by "multiculturalism,"[32] it need not signal the arrival of barbarians at the gates but may only mark another stage in the statist involution of liberalism. Huntington's fears of a decline of the West at a time when it is actually at the acme of its power and vigor is the result of the unwarranted identification of Western civilization with liberalism and what he understands by "American national identity." Today liberalism has degenerated into an opportunistic statist program of "a small but influential number of intellectuals and publicists," and "American national identity" into a fiction invented as part of a failed project after the War between the States to reconfigure the American federation into a nation-state.[33]

According to Huntington, the assumption of the universality of Western culture is: *false*, because others civilizations have other ideals and norms; *immoral*, because "imperialism is the logical result of universalism"; and *dangerous*, because it could lead to major civilizational wars.[34] His equation of universalism and imperialism, however, misses the point of both — it misunderstands the philosophical foundations of Western culture and the historical roots of Western imperialism. Other civilizations do have their own ideals and norms, but only Western civilization has an outlook broad enough to embrace all other cultures, which explains why it can readily sponsor and accommodate even confused and counterproductive projects such as "multiculturalism." Of course, Europeans set forth on their journeys of discovery and conquest not only in order to bring Christianity and "civilization" to the world but also to plunder whatever riches they could find. But whatever the reasons, Europeans were the ones who opened the world to *global* consciousness and what Schmitt called "awakened occidental rationalism."

32. Huntington, *The Clash of Civilizations*, *op. cit.*, p. 305.
33. See Paul Piccone, "Postmodern Populism," in *Telos* 103 (Spring 1995), pp. 45-86.
34. McNeill applauds Huntington's rejection of the moral imperialism implicit in American rhetoric, given the lack of resolve to back it up. See McNeill, "Decline of the West?" *op. cit.*, p. 18. In so doing, however, both McNeill and Huntington betray their latent Wilsonianism and self-righteousness.

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Until recently, largely because of American cultural hegemony and technological supremacy, the goal of the rest of the world has been "Westernization," which has come to be regarded as synonymous with modernization. In Huntington's "realist" view, however: "A universal civilization requires universal power. Roman power created a near universal civilization within the limited confines of the Classical world. Western power in the form of European colonialism in the nineteenth century and American hegemony in the twentieth century extended Western culture throughout much of the contemporary world. European colonialism is over; American hegemony is receding."[35] The real question is whether continued American world hegemony is primarily a function of the persistence of colonialism. Despite his emphasis on culture and civilization, Huntington does not appreciate the importance of *cultural hegemony*. Had he not restricted the Western tradition to late 20th century liberalism, he may have appreciated the extent to which the rest of the world is becoming increasingly more, rather than less dependent on the US — in communication technologies, financial matters and even aesthetic forms. Today the Internet is potentially a more formidable agency of cultural domination and control than was the British Navy at the peak of the Empire. Here McNeill is right: Huntington's gloomy perception of the decline of the West may merely mistake growing pains for death throes.

If Huntington's salon Spenglerianism were not bad enough, he also adopts a kind of simplistic Schmittianism (without ever mentioning Schmitt). Complementing his "birds of a feather flock together" concept of civilizations — with "core states" assuming a dominant position in relation to "fault line" states — he pictures an "us versus them" type of friend/enemy relations based on ethnic and religious identities. But Schmitt's friend/enemy antithesis is concerned with relations between political groups: first and foremost, states. Accordingly, any organized group that can distinguish between friends and enemies in an existential sense becomes thereby political. Unlike Huntington (or Kojève, who also explicitly drew geopolitical lines primarily along religious lines[36]), Schmitt did not think in terms of ethnic or religious categories but rather *territorial* and geopolitical concepts. For Schmitt, the state was the greatest achievement of Western civilization because, as the main agency of secularization, it ended the religious civil wars of the Middle Ages by limiting war to a

35. Huntington, *The Clash of Civilizations*, *op. cit.*, p. 91.
36. Kojève, "L'Empir Latin," *op. cit.*

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conflict between states.[37] In view of the decline of the state, Schmitt analyzed political realities and provided a prognosis of possible future *territorial* aggregations and new types of political forms.

Huntington finds the "realist" school of international affairs "a highly useful starting point," but then proceeds to criticize a straw man version of it, according to which "all states perceive their interests in the same way and act in the same way." Against it, not only power but also "values, culture, and institutions pervasively influence how states define their interests. . . . In the post-Cold War world, states increasingly define their interests in civilizational terms."[38] Had Huntington paid more careful attention to Hans Morgenthau, George Kennan or other reputable political realists, he would have concluded that their concept of power is not as limited as his caricature of it. In particular, had he read Schmitt more closely he would not have claimed that nation-states "are and will remain the most important actors in world affairs"[39] — at a time when economic globalization has severely eroded their former sovereignty and they are practically everywhere threatened with internal disintegration and new geopolitical organizations. At any rate, political realism has been concerned primarily with the behavior of states because they were the main subjects of political life for the past three centuries.[40] If and when they are displaced

37. See "Just Wars or Just Enemies?" in this issue of *Telos*. Huntington acknowledges the importance of the *ius publicum Europaeum* in defining international law from the Treaty of Westphalia to very recently (*op. cit.*, p. 54). In a typically ahistorical fashion, however, he predicts the return of the *status quo ante* of religious strife as a result of the decline of the *ius publicum Europaeum*. He does not seem to realize that, although rooted in the Christian tradition, Western civilization has long since become secular — at least in its political forms — and, as such, able to accommodate practically all religions and ethnicities. It is unclear, therefore, why non-Western religions should pose any political threat to Western hegemony.

38. Huntington, *The Clash of Civilizations*, *op. cit.*, pp. 33-34

39. *Ibid.*, p. 36.

40. Already in the 1920s, Schmitt noted that definitions of the political exclusively in terms of the state were justifiable only as long as the state was a clear and unequivocal entity confronting nonpolitical groups, i.e., only as long as it held a monopoly on politics, as in the 18th century (when it had not yet recognized society as an antithetical force), or at least stood above society (as it did in the 19th and into the 20th century). But the equation of state and politics ceases to make sense precisely "when state and society penetrate each other" (Schmitt, *The Concept of the Political*, *op. cit.*, p. 22), i.e., when ostensibly neutral domains such as religion, culture, education, the economy, etc., become politicized. In 19th century Europe, liberalism insisted on the antithesis of state and society, state and economy, etc., while democracy tended to eliminate all such antitheses. Once "liberal democracy" became dominant, however, the age of the state was over and the political expanded to include other agencies. This state of affairs does not make political realism obsolete, since it requires only that concrete political situations be analyzed in *political* terms and the subjects and goals of politics be determined accordingly.

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by other political forms, political realism then shifts its focus accordingly.

Huntington attempts to think beyond the Cold War. But since he cannot think beyond the nation-state, he cannot conceive of new political forms. When he writes that cultural commonality "legitimates the leadership and order-imposing role of the core state for both member states and for the external powers and institutions,"[41] he seems to have in mind something akin to the concept of *Großraum*.[42] But Schmitt's model was the American Monroe Doctrine excluding European meddling in the Western Hemisphere. At that time (and well into the 20th century), the US was not a nation-state in the European sense, although it assumed some of these trappings thereafter. Thus it generally followed George Washington's policy — because of the "detached and distant situation" of the US, it should avoid entangling alliances with foreign (primarily European) powers. The Monroe Doctrine simply expanded on the reality and advantages of this situation. Schmitt rightly saw the global line of the Western Hemisphere drawn by the Monroe Doctrine as the first major challenge to the international law of the *ius publicum Europaeum*.

Given the current understanding of national sovereignty, it is difficult to see what Huntington means by "core state." Despite the title of his book, he has no concept of international law or of world order. Not only does he abandon hope for global regulations governing the behavior of states and civilizations, but he reverts to a kind of anthropological primitivism: "Civilizations are the ultimate human tribes, and the clash of civilizations is tribal conflict on a global scale."[43] All he can suggest for avoiding major inter-civilizational wars is the "*abstention rule*" (core states abstain from conflicts in other civilizations), and the "*mediation rule*" (core states negotiate with each other to halt fault line wars).[44] Huntington's vision is thus surprisingly conformist — it merely cautions the US from becoming embroiled in the *Realpolitik* of countries belonging to other civilizational blocs while defending a contrived liberal notion of "Western" civilization.

Anti-Colonialism and Appropriation

The anti-colonialism of both Fukuyama and Huntington is consistent with the predominant 20th century ideology directed primarily

41. Huntington, *The Clash of Civilizations*, *op. cit.*, p. 156.
42. Cf. Carl Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte* [1941] (Berlin: Duncker & Humblot, 1991).
43. *Ibid.*, p. 207.
44. *Ibid.*, p. 316.

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against Europe. Anti-colonialism is more historically significant than either anti-fascism and anti-communism. As Schmitt pointed out in 1962: "Both in theory and practice, anti-colonialism has an ideological objective. Above all, it is propaganda — more specifically, anti-European propaganda. Most of the history of propaganda consists of propaganda campaigns which, unfortunately, began as internal European squabbles. First there was France's and England's anti-Spanish propaganda — the *leyenda negra* of the 15th and 16th centuries. Then this propaganda became generalized during the 18th century. Finally, in the historical view of Arnold Toynbee, a UN consultant, the whole of Europe is indicted as a world aggressor."[45] Thus it is not surprising that the 500th anniversary of the "discovery" of America was greeted with more condemnation than celebration.[46]

Anti-colonialism is primarily anti-European propaganda because it unduly castigates the European powers for having sponsored colonialism.[47] Given that there was no international law forbidding the appropriation of the newly discovered lands — in fact, European international and ecclesiastical law made it legal and established rules for doing so — the moral and legal basis for this judgment is unclear. On closer analysis, however, it turns out to be none other than the West's own universalistic pretenses. Only by ontologizing their particular Western humanist morality — various versions of secularized Christianity — as universally valid for all times and all places can Western intellectuals indict colonialism after the fact as an international "crime." Worse yet, this indictment eventually turns into a wholesale condemnation of Western culture (branded as "Eurocentrism") from an abstract, deterritorialized and deracinated humanist perspective hypostatized to the level of a universally binding absolute morality. Thus the original impulse to vindicate the particularity and otherness of the victims of colonialism turns full circle by subsuming all within a foreign Western frame-work, thereby obliterating the otherness of the original victims. The

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45. Carl Schmitt, "El orden del mundo desués la segunda guerra mundial," in *Revista de Estudios Politicos*, No. 122 (March-April, 1962), pp. 19-36, tr. by Günter Maschke as "Die Ordnung der Welt nach dem Zweiten Weltkrieg" in Günter Maschke, ed., Carl Schmitt, *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916-1969* (Berlin: Duncker & Humblot, 1995), p. 594.

46. See "Is Eurocentrism a Racist Concept?" in Dinesh D'Sousa, *The End of Racism: Principles for a Multiracial Society* (New York: The Free Press, 1995), pp. 346-357.

47. For a politically correct synopsis of the relevant theories and literature, see Patrick Wolfe, "History and Imperialism: A Century of Theory, from Marx to Postcolonialism," in *American Historical Review* (April 1997), pp. 388-420.

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ideology of anti-colonialism is thus not only anti-European propaganda but an invention of Europeans themselves, although it has been appropriated wholesale and politically customized by the rest of the world.

As for world order, this propaganda has even more fundamental roots: "The odium of colonialism, which today confronts all Europeans, is the odium of appropriation,"[48] since now everything understood as *nomos* is allegedly concerned only with distribution and production, even though appropriation remains one of its fundamental, if not *the most* fundamental, attributes. As Schmitt notes: "World history is a history of progress in the means and methods of appropriation: from land appropriations of nomadic and agricultural-feudal times, to sea appropriations of the 16th and 17th centuries, to the industrial appropriations of the industrial-technical age and its distinction between developed and undeveloped areas, to the present day appropriations of air and space."[49] More to the point, however, is that "until now, things have somehow been appropriated, distributed and produced. Prior to every legal, economic and social order, prior to every legal, economic or social theory, there is the simple question: *Where and how was it appropriated? Where and how was it divided? Where and how was it produced?* But the sequence of these processes is the major problem. It has often changed in accordance with how appropriation, distribution and production are emphasized and evaluated practically and morally in human consciousness. The sequence and evaluation follow changes in historical situations and general world history, methods of production and manufacture — even the image human beings have of themselves, of their world and of their historical situation."[50] Thus the odium of appropriation exemplified by the rise of anti-colonialism is symptomatic of a changed world situation and changed attitudes. But this state of affairs should not prevent our understanding of what occurred in the past or what is occurring in the present.

In order to dispel the "fog of this anti-European ideology," Schmitt recalls that "everything that can be called international law has for centuries been European international law. . . [and that] all the classical concepts of

48. See Schmitt notes appended to "Nehmen/Teilen/Weiden (1953)," reprinted in his *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954: Materialien zu einer Verfassungslehre* (1958), Second Edition (Berlin: Duncker & Humblot, 1973), p. 503. See also G. L. Ulmen, "The Concept of Nomos: Introduction to Schmitt's 'Appropriation/Distribution/Production'," and Carl Schmitt, "Appropriation/Distribution/Production: Toward a Proper Formulation of Basic Questions of any Social and Economic Order (1953)," in *Telos* 95 (Spring 1993), pp. 39-51 and 52-64 respectively.

49. Schmitt, "Appropriation/Distribution/Production," *op. cit.*, p. 46.

50. *Ibid.*, p. 56.

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existing international law are those of European international law, the *ius publicum Europaeum*. In particular, these are the concepts of war and peace, as well as two fundamental conceptual distinctions: first, the distinction between war and peace, i.e., the exclusion of an in-between situation of neither war nor peace so characteristic of the Cold War; and second, the conceptual distinction between enemy and criminal, i.e. exclusion of the discrimination and criminalization of the opponent so characteristic of revolutionary war — a war closely tied to the Cold War."[51] But Schmitt was more concerned with the "spatial" aspect of the phenomenon: "What remains of the classical ideas of international law has its roots in a purely Eurocentric spatial order. Anti-colonialism is a phenomenon related to its destruction. . . . Aside from . . . the criminalization of European nations, it has not generated one single idea about a new order. Still rooted, if only negatively, in a spatial idea, it cannot positively propose even the beginning of a new spatial order."[52]

Having discovered the world as a globe, Europeans also developed the Law of Nations. Hugo Grotius is usually credited with establishing this new discipline with his *De iure belli ac pacis* (Paris: 1625), since he was the first to deal with the subject as a whole (although various European scholars had dealt at length with themes such as the justice of war, the right of plunder, the treatment of captives, etc.). Nys writes: ". . . from the 11th to the 12th century the genius of Europe developed an association of republics, principalities and kingdoms, which was the beginning of the society of nations. Undoubtedly, some elements of it had been borrowed from Greek and Roman antiquity, from Byzantine institutions, from the Arabo-Berber sultanates on the coast of Africa and from the Moorish kingdoms of Spain. But at the time new sentiments developed, longing for political liberty. The members of this association were united by religious bonds; they had the same faith; they were not widely separated by speech and, at any rate, they had access to Latin, the language of the Church; they admitted a certain equality or at least none of them claimed the right to dominate and rule over the others. A formula came into use to describe this state of affairs: *respublica Christiana, res Christiana*."[53]

Steeped in Roman law, 13th and 14th century jurists opposed any "Law of Nations" recognizing political distinctions between different peoples. In

51. Schmitt, "Die Ordnung der Welt nach dem Zweiten Weltkrieg," in Schmitt, *Staat, Großraum, Nomos, op. cit.*, p. 594.
52. *Ibid.*, p. 595.
53. Nys, "Introduction," *op. cit.*, pp. 55-56.

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the Roman system, different peoples were only "parts of the Roman Empire." Thus, in a wider sense, *ius gentium* extended to all civilized peoples and included both public and private law. In a narrower sense, however, it also dealt with the rules governing relations between Romans and foreigners. Understood in this narrower sense, *ius gentium* promoted the constitution of distinct peoples and consequently kingdoms, intercourse and conflicts between different political communities, and ultimately wars. For this reason, those who still believed in the viability of the Holy Roman Empire thought that this interpretation of *ius gentium* led to disintegration. This is why the Law of Nations — European public law and international law — did not become a distinct "science" until the Middle Ages.

Spanish theologians first articulated the theoretical and practical problems of *ius gentium* understood as the Law of Nations. Chief among them was Francisco de Vitoria, whose *Relectiones theologicae* on the Indians and the right of a "just war" have become classics. [54] In his lectures, Vitoria invokes the Law of Nations — the *ius gentium*. At the beginning of the third section of his account of the Spaniards' relations with the aborigines in the New World, he treats them as one people among others, and therefore subject to *ius gentium*: "The Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them. Proof of this may in the first place be derived from the law of nations (*ius gentium*), which either is natural law or is derived from natural law."[55] That he understands peoples in the sense of "nations" becomes even more clear when he speaks about *gentes nationes*. He distinguishes between the political community — the *respublica* — and the private individual. The latter may defend his person and his property, but he may not avenge wrongs or retake goods after the passage of time. This is the *respublica*'s prerogative — it alone has authority to defend itself and its members. Here Vitoria identifies the prince's authority with that of the state: "The prince is the issue of the election made by the *respublica*. . . . The state, properly so called, is a perfect

54. At the time, a "*relectio*" was a kind of theological exercise similar to the disputations in celebrated universities in earlier epochs known as *quodlibeticae questiones*. See the editorial preface to *Relectiones theologicae XII*, written by "one of the Doctors of Sacred Theology at Ingolstadt," in *ibid.*, p. 110. Although Vitoria never published anything himself, his former students edited his lectures after his death. The first edition appeared in Lyon in 1557; a more reliable one in Salamanca in 1565. These lectures are "devoted to an examination of the titles which the Spanish might put forward in order to justify their domination in the New World. They were delivered in 1532 and are the first complete exposition of the question." See Nys, "Introduction," *op. cit.*, p. 83.

55. Vitoria, *De indis*, *op. cit.*, pp. 257 and 151.

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community, that is to say, a community which forms a whole in itself, which, in other words, is not a part of another community, but which possesses its own laws, its own council, its own magistrates."[56]

Clearly, what developed in Europe from antiquity to the *respublica Christiana*, from the origin of the sovereign state and *ius publicum Europaeum* to the Enlightenment and beyond, was as unique and significant as the discovery of the "New World." Yet, given today's predominant ideology, European culture has almost become the truth that dare not speak its name. Not only is Columbus demonized, but the whole Age of Discovery and all of European (Western) culture is dismissed as "imperialistic," "racist," "sexist," etc. *The Nomos of the Earth* is a much needed antidote to this anti-European propaganda, which is only a symptom of the crisis of European identity and consciousness.[57] All the major themes of Schmitt's book are either implicit or explicit in "The Land Appropriation of a New World": the origin and significance of the European and Eurocentric epoch of world history; the discovery of the New World and the American challenge to the European order; the search for a new *nomos* of the earth; the critique of the discriminatory concept of war; the critique of universalism and the danger of total relativism.

The Conquest of America and the Concept of a "Just War"

In the 20th century, the ideology of anti-colonialism was articulated most prominently by Woodrow Wilson and Vladimir Lenin, signaling the end of European domination in world history. Now, after the collapse of

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56. Quoted in Nys, "Introduction," *op. cit.*, pp. 91-92.

57. See the discussion of the crisis in Paul Piccone and G. L. Ulmen, "Schmitt's 'Testament' and the Future of Europe," in *Telos* 83 (Spring, 1990), pp. 21ff.: "Both Schmitt's European jurisprudence and Husserl's European science are different facets of the same epoch-making project, begun in Greece and subsequently codified with science and Roman law, to structure life rationally. Because of their different thematic concerns, Husserl's reconstruction leaps over two millennia, from Athenian Greece to Descartes, while Schmitt's goes from Roman law to Hobbes and Savigny. Yet both accounts focus on the roots of the project — understood not as an ethnic, racial or geographical construct, but as a cultural one which, to the extent that it aspires to universality, encompasses all of humanity. . . . Recent fashionable challenges of the whole Western project from the viewpoint of an advanced stage of development of that very same project are pre-subverted by this very fact, thus undermining the alleged radical character of the challenges and rendering them hopelessly parasitic. When transubstantiated into a post-modern Western cultural imperialism, this philosophical ploy turns out to be merely another subtle way of perpetuating that same cultural imperialism by other means. . . . Thus the solution to the crisis of European science and jurisprudence can only be *internal* to the project, i.e., from the viewpoint of universalizing consciousness gone astray to the point of forgetting its own identity" (p. 22).

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the Soviet Union and the end of communism, some American intellectuals have turned this anti-European propaganda against the US, seemingly unaware that their critique is possible only within the orbit of the European culture they otherwise castigate and dismiss. To attack European culture is tantamount to attacking American culture as well, since the latter is but a special case of the former, which is precisely why it has been able to accept and absorb peoples and influences not only from the Western hemisphere but from all over the world. American universalism is but an extension of that same Christian universalism which for centuries has defined European identity. As Schmitt emphasized, the European equilibrium of the *ius publicum Europaeum* presupposed a seemingly homogeneous Christian Europe, which lasted well into the 19th century. The American project has always been a fundamentally heterogeneous undertaking and Americans have always come from the most diverse ethnic, racial, religious and linguistic backgrounds. But if there had not been some homogeneous culture to unify this diversity, there would have been no distinct American culture which, unfortunately, today many educated Europeans and Americans no longer understand and therefore have come to despise.

A paradigmatic example of this general anti-European syndrome is Tzvetan Todorov's *The Conquest of America*. In an effort to vindicate the particularity of "the other," the author ends up castigating West European culture as a whole by deploying a secularized version of Christian universalism. Openly acknowledging the moralistic objectives and "mythological" character of his account,[58] Todorov develops a "politically correct" postmodern interpretation of the Spanish *conquista* not to understand its historical significance but to show how it has shaped today's Western imperialist identity — one allegedly still unable to come to terms with "the other" and therefore inherently racist, ethnocentric, etc. The book closes with a discussion of "Las Casas' Prophesy" concerning the wrath that "God will vent" not only upon Spain but all of Western Europe because of its "impious, criminal and ignominious deeds perpetrated so unjustly, tyrannically and barbarously."[59]

Todorov overlooks not only the generally religious framework of Las Casas' prophesy, but also the idiosyncratically Western concept of justice

58. Tzvetan Todorov, *The Conquest of America: The Question of the Other* (1982), tr. by Richard Howard (New York: Harper & Row, Publishers, 1984), p. 4. See also Jeremy Varon, "The Dreadful Concatenation: Modernity and Massacre in Todorov, Adorno and Horkheimer," in *New German Critique* 59 (Spring/Summer 1993), pp. 153-192.

59. Quoted in Todorov, *op. cit.*, p, 246.

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the Dominican bishop deployed. Having ontologized a humanism derived from the Western axiological patrimony, he does not realize the extent to which his postmodernism has already reduced "the other" to "the same," precisely in his effort to vindicate its particularity.[60] Worse yet, inhibited by his "politically correct" moralism, he not only provides a ridiculous, if academically fashionable, explanation for the Spaniards' success,[61] but he manages to subvert his own arguments with the very evidence he adduces to support them. He claims that the "present" is more important to him than the past, but in defining genocide he makes no reference whatsoever to either the Armenians or the Holocaust as reference points. Consequently, his claim that "the sixteenth century perpetuated the greatest genocide in human history"[62] remains not only unsubstantiated but falsified. By his own account, most of the victims died of diseases and other indirect causes: "The Spaniards did not undertake a direct extermination of these millions of Indians, nor could they have done so." The main causes were three, and "the Spaniards' responsibility is inversely proportional to the number of victims deriving from each of them: 1. By direct murder, during wars or outside them: a high number, nonetheless *relatively* small; direct responsibility. 2. By consequence of bad treatment: a high number; a (barely) less direct responsibility. 3. By diseases, by 'microbe shock': the majority of the population; an indirect and diffused responsibility."[63]

Todorov does acknowledge that Columbus was motivated by the "universal victory of Christianity" and that it was Columbus' medieval mentality that led him "to discover America and inaugurate the modern era."[64] His greatest infraction, however, was that he conquered *land* rather than people, i.e., he was more interested in *nature* than in the Indians, which he

60. The problem of "the same" inexorably overwhelming "the other" goes back to Plato's *Sophist* and *Timeaus*. In fact, Emmanuel Lavinas condemns all of Western philosophy for always reducing "the other" to "the same." See Adrian Peperzak, *The Other: An Introduction to the Philosophy of Emmanuel Lavinas* (West Lafayette, IN: Purdue University Press, 1993), p. 99. It remains unclear the extent to which such a critique applies only to modernity rather than to Western philosophy as such, and whether a truly equitable account of "the other" necessitates moving from philosophy to theology. In the present context, however, it is immediately obvious that not only does Todorov not escape Western philosophy, but he remains so inextricably entangled within modernity and secularism as to rule out any possibility of doing justice to "the other" or, as he puts it, of taking "a first step into the world of the discovery of the other" (*op. cit.*, p. 4) without automatically reducing it to "the same."

61. Almost laughable, but fully in line with the current academic fad of linguistic "discourses," is Todorov's claim that the Spaniards won by means of "communication," in other words, by deploying "signs." See Todorov, *op. cit.*, p. 251ff.

62. *Ibid.*, p. 5.

63. *Ibid.*, p. 133.

64. *Ibid.*, pp. 10 and 12.

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treated as "the other": "Columbus' summary perception of the Indians [is] a mixture of authoritarianism and condescension . . . In Columbus' hermeneutics human beings have no particular place."[65] Had Todorov set aside his abstract moralizing, he may have realized that the conquest of the New World was primarily a land appropriation. It is not surprising, therefore, that the conquerors thought they were bringing "civilization" to those they conquered — something probably also true of the Mongols who invaded and colonized China, Russia and a few other countries which, by contrast, had higher civilizations than their own.

The ideological slant of *The Conquest of America* is by no means unusual. Long before, Schmitt noted that non-European peoples who have undertaken conquests, land appropriations, etc. were not being tarred with the same brush as Europeans.[66] Unlike Todorov's moralistic tirade, *The Nomos of the Earth* is addressed to historians and jurists. In no way does Schmitt excuse the atrocities committed by the Spanish, but rather explains how they were possible in the given circumstances. "The Land Appropriation of a New World" begins with a discussion of the lines drawn by the European powers to divide the world. In this connection, Schmitt discusses the meaning of "beyond the line," which meant beyond the reach of European law: "At this 'line' Europe ended and the 'New World' began. At any rate, European law — 'European public law' — ended. Consequently, so did the bracketing of war achieved by the former European international law, meaning the struggle for land appropriations knew no bounds. Beyond the line was an 'overseas' zone in which, for want of any legal limits to war, only the law of the stronger applied."[67] For Todorov, it

65. *Ibid.*, p. 33.

66. With respect to the anti-European attitude, Schmitt wrote: "It appears that the conquests, land appropriations and suppressions by non-European peoples are not subject to the odium of anti-colonialism." See Schmitt, "El Orden del Mundo depues la segunda Guerra Mundial," in *Revista de Estudios Politicos*, *op. cit., p. 15.* Even Todorov seems to be somewhat aware of this state of affairs, as he writes: "We cannot avoid wondering, when we read the history of Mexico, why did the Indians not offer more resistance? Didn't they realize Cortéz's colonizing ambitions? The answer displaces the question: the Indians in the regions Cortés first passed through are not more impressed by his imperialist intentions because they have already been conquered and colonized — by the Aztecs. . . . So that far from incarnating an absolute evil, Cortéz often appears to them as a lesser evil, as a liberator, so to speak, who permits them to throw off the yoke of a tyranny especially detestable because so close at hand." See Todorov, *op. cit.*, p. 58. Shortly thereafter, however, Todorov cannot resist forcing a comparison unfavorable to the Spaniards: "here we may speak of sacrifice-societies and massacre-societies, of which the Aztecs and the sixteenth century Spaniards would be the respective representatives," *ibid.*, p. 143.

67. Carl Schmitt, "The Land Appropriation of a New World," in this issue of *Telos*, p. 36.

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is a much simpler explanation: "Far from central government, far from royal law, all prohibitions give way, the social link, already loosened, snaps, revealing not a primitive nature, the beast sleeping in each of us, but a modern being, one with a great future in fact, restrained by no morality and inflicting death because and when he pleases."[68] The Spaniards are simply racist, ethno-centric, ruthless exploiters, etc., i.e., modern — they already exhibited traits Todorov claims are characteristic of Western identity.

Of particular interest here are Todorov's comments on Vitoria and the concept of a "just war," since most of Schmitt's chapter is devoted to these subjects. By his own admission, Todorov mixes (in fact, confuses) medieval and modern categories. This is particularly true in the case of Vitoria. Todorov observes that: "Vitoria demolishes the contemporary justifications of the wars waged in America, but nonetheless conceives that 'just wars' are possible."[69] More to the point: "We are accustomed to seeing Vitoria as a defender of the Indians; but if we question, not the subject's intentions, but the impact of his discourses, it is clear that . . . under the cover of an international law based on reciprocity, he in reality supplies a legal basis to the wars of colonization which had hitherto had none (none which, in any case, might withstand serious consideration)."[70] But there was no "international law based on reciprocity." Here Todorov is simply transposing modern categories to medieval matters for his own ideological purposes.

Unlike Todorov, Schmitt places the problem in perspective: "For 400 years, from the 16th to the 20th century, the structure of European international law was determined by a fundamental course of events — the conquest of the New World. Then, as later, there were numerous positions taken with respect to the justice or injustice of the *conquista*. Nevertheless, the fundamental problem — the justification of European land appropriations as a whole — was seldom addressed in any systematic way outside moral and legal questions. In fact, only one monograph deals with this problem systematically and confronts it squarely in terms of international law. . . . It is the famous *relectiones* of Francisco de Vitoria."[71] Vitoria rejected the contrary opinions of other theologians and treated Christians and non-Christians alike. He did not even accept discovery, which was the recognized basis of legal title from the 16th to the 18th century, as legitimate. More to the point, he considered global lines beyond which the distinction

68. Todorov, *The Conquest of America*, *op. cit.*, p. 145.
69. Todorov, *ibid*, p. 149.
70. *Ibid.*, p. 150.
71. Schmitt, "The Land Appropriation of a New World," *op. cit.*, p. 46.

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between justice and injustice was suspended not only a sin but an appalling crime. However: "Vitoria's view of the *conquista* was ultimately *altogether positive*. Most significant for him was the *fait accompli* of Christianization. . . . The positive conclusion is reached only by means of general concepts and with the aid of objective arguments in support of a just war. . . . *If* barbarians opposed the right of free passage and free missions, of *liberum commercium* and free propaganda, then they would violate the existing rights of the Spanish according to *ius gentium*; if the peaceful treaties of the Spanish were of no avail, then they had grounds for a just war."[72]

The papal missionary mandate was the legal foundation of the *conquista*. This was not only the pope's position but also that of the Catholic rulers of Spain. Vitoria's arguments were entirely consistent with the spatial order and the international law of the *respublica Christiana*. One cannot apply modern categories to a medieval context without distorting both: "In the Middle Ages, a just war could be a *just war of aggression*. Clearly, the formal structure of the two concepts of justice are completely different. As far as the substance of medieval justice is concerned, however, it should be remembered that Vitoria's doctrine of a just war is argued on the basis of a missionary mandate issued by a *potestas spiritualis* that was not only institutionally stable but intellectually self-evident. The right of *liberum commercium* as well as the *ius peregrinandi* are to facilitate the work of Christian missions and the execution of the papal missionary mandate. . . . Here we are interested only in the justification of land appropriation — a question Vitoria reduced to the general problem of a just war. All significant questions of an order based on international law ultimately meet in the concept of a just war."[73]

The Question of a New Nomos *of the Earth*

Following chapters on "The Land Appropriation of a New World" and "The *Ius Publicum Europaeum*," Schmitt concludes his book with a chapter titled "The Question of a New *Nomos* of the Earth, which is concerned primarily with the transformation of the concept of war. Clearly, this problem was uppermost in Schmitt's mind following Germany's total defeat in WWII and the final destruction of the European system of states. But he had already devoted a treatise to the development of a discriminatory concept of war following WWI,[74] and in 1945 he wrote a legal opinion on the criminality of

72. *Ibid.*, p. 51.
73. *Ibid.*, pp. 31-3.
74. Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff*, Schriften der Akademie für Deutsches Recht, No. 5 (Munich: Duncker & Humblot, 1938).

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aggressive war.[75] Despite whatever self-serving motives he may have had in writing these works,[76] they are consistent with the historical and juridical structure of international law during the *respublica Christiana*, the *ius publicum Europaeum*, and what remains of international law today.

This progression can be put into perspective by following Schmitt's discussion of Vitoria's legacy: "Vitoria was in no sense one of the 'forerunners of modern lawyers dealing with constitutional questions.'. . . Abstracted entirely from spatial viewpoints, Vitoria's ahistorical method generalizes many European historical concepts specific to the *ius gentium* of the Middle Ages (such as *Volk*, prince and war) and thereby strips them of their historical particularity."[77] In this context, Schmitt mentions the works of Ernest Nys, which paved the way for the popularization of Vitoria's ideas after WWI but who, because of his belief in humanitarian progress, also contributed to the criminalization of aggressive war. This was also true of James Brown Scott, the leading American expert on international law, who blatantly instrumentalized Vitoria's doctrines concerning free trade (*liberum commercium*, the freedom of propaganda, and a just war) to justify American economic imperialism. Schmitt sums up Sctott's argument as follows: "War should cease to be simply a legally recognized matter or only one of legal indifference; rather, it should again become a *just* war in which the aggressor as such is declared a felon in the full criminal sense of the word. The former right to neutrality, grounded in the international law of the *ius publicum Europaeum* and based on the equivalence of just and unjust war, should also and accordingly be eliminated."[78]

Here then is the crux of the matter. Vitoria's thinking is based on the international law obtaining during the Christian Middle Ages rather than on the international law between states established with the *ius publicum Europaeum*. Moreover, as Schmitt points out, Vitoria was not a jurist but a theologian: "Based on relations between states, post-medieval international law from the 16th to the 20th century sought to repress the *iusta causa*. The formal reference point for the determination of a just war was no longer the authority of the Church in international law but rather the *equal sovereignty*

75. Carl Schmitt, *Das internationale Verbrechen des Angriffskrieges und der Grundsatz "Nullum crimen, nulla poena sine lege,"* ed. with Notes and an Afterword by Helmuth Quaritsch (Berlin: Duncker & Humblot, 1994). See "Just Wars or Just Enemies?" in this issue of *Telos*.

76. Günter Maschke describes at length the historical context of Schmitt's writings in his "Introduction" to Schmitt, *Staat, Großraum, Nomos*, *op. cit.*, pp. XIII-XXVII.

77. Schmitt, "The Land Appropriation of a New World," *op. cit.*, p. 56.

78. *Ibid.*, p. 61.

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of states. Instead of *iusta causa*, the order of international law between states was based on *iustus hostis*; any war between states, between equal sovereigns, was legitimate. On the basis of this juridical formalization, a rationalization and humanization — a bracketing — of war was achieved for 200 years." The turn to "the modern age in the history of international law was accomplished by a *dual division* of two lines of thought that were inseparable in the Middle Ages — the definitive separation of moral-theological from juridical-political arguments and the equally important separation of the question of *iusta causa*, grounded in moral arguments and natural law," from the juridical question of *iustus hostis*, distinguished from the criminal, i.e., from object of punitive action."[79]

With the end of the *ius publicum Europaeum*, the concept of war changed once again: moralistic (rather than theologically-based) arguments became confused with political arguments, and the *iusta causa* displaced the just enemy (*iustus hostis*). Accordingly, war became a crime and the aggressor a criminal, which means that the current distinction between just and unjust war lacks any relation to Vitoria and does not even attempt to determine the *iusta causa*.[80] According to Schmitt: "If today some formulas of the doctrine of a just war rooted in the concrete order of the medieval *respublica Christiana* are utilized in modern and global formulas, this does not signify a return to, but rather a fundamental transformation of concepts of enemy, war, concrete order and justice presupposed in medieval doctrine."[81] This transformation is crucial to any consideration of a new *nomos* of the earth because these concepts must be rooted in a concrete order. Lacking such an order or *nomos*, these free-floating concepts do not constitute institutional standards but have only the value of ideological slogans.

Unimpressed with the duration of the Cold War and its mixture of neither war nor peace, Schmitt speculated on the possibility of the eventual development of what he called *Großräume*[82] — larger spatial entities, similar to but not synonymous with federations or blocs — displacing states and constituting a new *nomos*.[83] Since his death in 1985 and the subsequent

79. *Ibid.*, p. 63
80. *Ibid.*, p. 64.
81. *Ibid.*, p. 65.
82. Cf. Schmitt, *Volkerrechtliche Grossraumordnung*, *op. cit.*
83. See "Die Einheit der Welt (1952)," "Der neue Nomos der Erde (1955)," "Welt grossartigster Spannung (1954)," "Die geschichtliche Struktur des heutigen Welt-Gegensatzes von Ost und West: Bemerkungen zu Ernst Jüngers Schrift 'Der Gordische Knoten' (1955)," "Gespräch Über den Neuen Raum (1955/58)," all in Schmitt, *Staat, Groraum, Nomos*, *op. cit.*, pp. 496-572 inclusive.

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collapse of communism, the likelihood of his diagnosis and prognosis has increased. While the international situation remains confused and leading intellectuals such as Fukuyama and Huntington, unable to think behind predominant liberal democratic categories, can only recycle new versions of the old Wilsonianism, Schmitt's vision of a world of *Großräume* as a new geopolitical configuration may well be in the process of being realized.

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*The Land Appropriation of a New World**

Carl Schmitt

The First Global Lines

Shortly after the contours of the earth emerged as a true globe — not just sensed as myth but apprehensible as fact and measurable as space — there arose a wholly new and hitherto unimaginable problem: the spatial ordering of the earth in terms of international law. The new global image required a new spatial order. That is the situation which arose with the circumnavigation of the earth and the great discoveries of the 15th and 16th centuries. It was also the beginning of the epoch of modern international law that lasted until the 20th century.

The struggle over land and sea appropriations of the New World began immediately after its discovery. The division and distribution of the earth increasingly became a concern of peoples and powers existing in close proximity. Lines were drawn to divide and distribute the earth. These were the first attempts to establish the dimensions and demarcations of a global spatial order. Since this took place during the first stage of the new planetary consciousness of space, they were conceived only in terms of surface areas — superficially, with divisions drawn more or less geometrically: *more geometrico*. Later, when historical and scientific consciousness had *assimilated* (in every sense of the word) the planet down to the last cartographical and statistical details, the practical-political need not only for a geometric surface division but a substantive spatial order of the earth became more evident.

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* Chapter II, "Die Landnahme einer neuen Welt," in Carl Schmitt, *Der Nomos der Erde im Völkerrecht der Jus Publicum Europaeum* (1950), Second Edition (Berlin: Duncker & Humblot, 1974), pp. 54-109. Translated by Gary Ulmen and Kizer Walker.

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Already in the 16th century, European international law considered Christian nations the creators and agents of an order applicable to the whole earth. In the 17th century, the term "European" meant the normal status which set the standard for the non-European part of the earth. Civilization was synonymous with *European* civilization. In this sense, Europe was still the center of the earth. With the appearance of the "New World," Europe became the Old World. America really was a completely new world because not even those scholars and cosmographers of antiquity and the Middle Ages who knew the earth was a ball and that India could be reached on the way to the west had any inkling of the great continent between Europe and East Asia.

In the Middle Ages, Christian princes and peoples considered Rome or Jerusalem the center of the earth and regarded themselves part of the Old World. Many thought the world old and close to ruin, e.g., this attitude dominates part of the historical work of Otto of Freising.[1] It was consistent with the Christian concept of the world, which saw the empire only as a restrainer — a *katechon* — of the Antichrist. By then, the most dangerous enemy — Islam — was no longer new; by the 15th century, Islam was already an old enemy. Thus in 1492, when a "new world" really did emerge, the structure of all traditional concepts of the *center* and *age* of the earth also had to change. European princes and nations now saw a vast, formerly unknown, non-European space arise beside them.

Most essential and decisive for the following centuries, however, was the fact that the emerging new world did not appear as a new enemy but rather as *free space* — an area open to European occupation and expansion. For 300 years, this was a tremendous affirmation of Europe both as the center of the earth and as an old continent. But it also destroyed previously held concrete concepts of the center and age of the earth because it initiated an internal European struggle for this new world that in turn led to a new spatial order of the earth with new divisions. Obviously, when an old world sees a new one arise beside it, it is dialectically challenged and is no longer old in the same sense.

The first attempts in international law to divide the earth as a whole according to the new geographical concept began immediately after 1492. These were also the first adaptations to the new — planetary — image of

1. [Tr.] During the German civil war the bishop Otto von Freising (1114-1158) wrote a historical and philosophical work, *Chronicon*, sometimes called *De duabus civitatibus*, in eight books. Following Augustine and Orosius, it contrasts Jerusalem and Babel, the heavenly and the earthly kingdoms.

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the world. Apparently, they were initially nothing more than crude seizures of land as part of an immense appropriation. Yet the struggle between European powers for land appropriations made necessary certain divisions and distributions. These sprang from what I call *global linear thinking*, which represents a chapter in the historical development of spatial consciousness. It began with the discovery of the New World and the start of the modern age, and kept pace with the development of geographical maps and of the globe itself. The word *global* captures the encompassing and planetary as well as the external and superficial character of this type of thinking, based on the equation of land and sea surfaces. The compound "global linear thinking" seems very fitting. At any rate, it is conceptually clearer and historically more accurate than other characterizations, such as Friedrich Ratzel's word "hologaic" [literally: whole earth][2]; it is also better than "planetary" or similar designations, which refer to the whole earth but fail to capture its characteristic type of division.

The question is political from the start; it cannot be dismissed as "purely geographical." As scientific, mathematical or technical disciplines, geography and cartography are certainly neutral. However, as every geographer knows, they can be instrumentalized in ways both immediately relevant and highly political. This is particularly evident with respect to the concept of the Western Hemisphere. Despite the neutrality of geography, purely geographical concepts can generate a political struggle which sometimes justifies Thomas Hobbes' pessimistic maxim that even arithmetic and geometric certainties become problematic if they fall within the sphere of the political — the intense friend-enemy distinction. For example, the fact that the prime meridian of the earth's cartographic grid is by and large still the one that runs through Greenwich is neither something purely objective and neutral nor purely coincidental; it is the result of a rivalry between various prime meridians. The French, who for 200 years were locked in a struggle with the English for domination of the seas and the world, regarded the Paris Observatory as the prime meridian since the 18th century. Only in the 20th century did they give up their opposition to the Greenwich meridian. Only in 1916 did the Berlin Yearbook of Astronomy change over to the Greenwich meridian. Thus it is not an excessive politicization of this apparently

2. [Tr.] The German geographer Friedrich Ratzel (1844-1904) was known for the biologistic approach he used in his *Athropogeographie* (2 Vols., 1882- 91) and *Politische Geographie* (1897), as well as for writing the first philosophy of world history: *Weltgeschichte* (9 Vols., 1899-1907).

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purely mathematical-geographical problem if we consider the universal validity of the Greenwich prime meridian a symptom of the former English domination of the seas and the world.

Almost immediately after the first maps and globes were produced and the first scientific concept of the true form of our planet and of the new world in the west were established, the first global lines of division and distribution were drawn. Shortly after the discovery of America, the famous line in Pope Alexander VI's edict *Inter caetera divinae* (May 4, 1494) was drawn.[3] It ran from the North Pole to the South Pole, 100 miles west of the meridian of the Azores and Cape Verde. The figure of 100 miles can be explained juridically by the fact that Bartolus [Bartoli of Saxoferrato, 1313-1357], Baldo [Ubaldi Baldo Degli, 1327-1400], and other law teachers postulated the zone of territorial waters as a journey of two days. The later antithesis of firm land and open sea, decisive for spatial ordering in international law from 1713 to 1939, was still completely foreign to these divisional lines.

The global line drawn by the pope was consistent with the one drawn somewhat to the west of it, approximately through the middle of the Atlantic Ocean (370 miles west of Cape Verde), by the Spanish-Portuguese Treaty of Tordesillas (June 7, 1494), in which the two Catholic powers agreed that all newly discovered territories west of the line would belong to Spain and those east of the line to Portugal. They called this division a "*partition del mar océano*" and had it sanctioned by Pope Julius II. The Molucca Line gradually became the border on the other half of the globe. In the Treaty of Saragossa (1526), a *raya* was drawn through the Pacific Ocean, at first along what is now the 135th meridian — through eastern Siberia, Japan and the middle of Australia.

These first global lines [*rayas*] are well-known to all historians, especially Spanish and Portuguese historians. But in recent years they have also been discussed with growing interest by international law

3. Earlier Portuguese-Spanish demarcation lines were not yet global. Even the Portuguese line of 1443, upheld by the pope in 1455, was not global; it was a "sea barrier" meant to restrict Portuguese shipping beyond the line — beyond Cape Bojador. Cf. Frances G. Davenport, *European Treaties Bearing on the History of the United States and its Dependencies*, 4 Vols. (Washington DC: Carnegie Institution of Washington, 1917-1937), Vol. I. On the Treaty of Tordesillas and the implementation agreement (May 7, 1495), see pp. 84f. Cf. also Adolf Rein, "Zur Geschichte der völkerrechtlichen Trennungslinie zwischen Amerika und Europa," in *Ibero-Amerikanisches Archiv*, Vol. 4 (1930), p. 531; and E. Staedler, "Zur Vorgeschichte der Raya von 1493," in *Zeitschrift für Völkerrecht*, Vol. XXV (1941), pp. 57-72. The papal awards to the Portuguese Order of Christ — the edict *Inter caetera* of March 13, 1456 — are also not global in this sense. They reach "*usque ad Indos*," but India is still thought to be located in the east.

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scholars.[4] Similarly, the "amity lines" initiated with the Spanish-French Treaty of Cateau Cambrésis (1559) have in recent years become again a matter of particular concern in international law, especially after Francis G. Davenport and Adolf Rein (since 1925), clarified their significance for colonial history.[5]

Global linear thinking has its own history, which constitutes a coherent progression from the discovery of America in 1492 to the American declarations of WWII. Yet it would be misleading, in view of the obvious continuity of this progression, to disregard the fact that these lines and the various stages of global linear thinking obtained within mutually distinct spatial orders and accordingly have very different meanings in terms of international law. In neither a theoretical nor a practical sense is the concept of global lines based indiscriminately on the same presuppositions and concepts of international law. The differences concern not only the geographical delineations of meridians but also the content of the politically presupposed spatial concepts, the intellectual structure of the linear concepts and even their inherent spatial order. I will first distinguish the various categories and then demonstrate the specific types and historical characteristics of global lines.

1. The first distinction becomes apparent with the great historical transformation leading from the Spanish-Portuguese divisional lines —

4. From the German side, see Staedler, "Zur Vorgeschichte der Raya von 1493," *op. cit.*, p. 57, and his article in the same issue of *Zeitschrift für Völkerrecht*, "Hugo Grotius über die '*donatio Alexandri*' von 1493 und der Metallus-Bericht," pp. 257-274. By regarding every contractual agreement as an expression of "modern" international-legal thinking, Staedler distinguishes too sharply between medieval-feudal law and "international-modern contractual thinking." This, however, does not diminish the historical value of his article. For the most recent Spanish literature, see Juan Manzano, "El decreto de la Corona de Castilla sobre el descubrimiento y conquista de las Indias de Ponente," in *La Rivista de Indias*, Vol. III (1942), pp. 397ff.

5. Carl Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte: Ein Beitrag zum Reichsbegriff im Völkerrecht* (1941), Second Edition (Berlin: Duncker & Humblot, 1991), p. 57; "Raum und Grossraum im Völkerrecht," in *Zeitschrift für Völkerrecht*, Vol. XXIV (1940), p. 155. The Treaty of Cateau-Cambrésis is reprinted in Davenport, *European Treaties*, *op.cit.*, Doc. 21, pp. 219ff; on this Treaty, see the excellent work by Adolf Rein, which only recently has been given its due in international law scholarship, *Der Kampf Westeuropas um Nordamerika im 15. und 16. Jahrhundert*, *Allgemeine Staatengeschichte* 2/3 (Stuttgart-Gotha: Perthes Verlag, 1925). On the maxim "Beyond the equator there are no sins," see Rein, *ibid.*, p. 292; on the significance of overseas expansion for the European system of states, see *Historische Zeitschrift*, Vol. 137 (1928), pp. 28ff. On the history of the dividing line between America and Europe in international law, see Rein, "Zur Geschichte der völkerrechtlichen Trennungslinie zwischen Amerika und Europa," in *Ibero-Amerikanisches Archiv*, *op. cit.*, pp. 530-543. See also Ulrich Scheuner, "Zur Geschichte der Kolonialfrage im Völkerrecht," in *Zeitschrift für Völkerrecht*, Vol. XXII, (1938), p. 466; Wilhelm Grewe, "Die Epochen der modernen Völkerrechtsgeschichte," in *Zeitschrift für die gesamte Staatswissenschaft*, Vol. 103 (1942), pp. 51ff.

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rayas — to the French-English friendship lines — amity lines. For a *raya* to obtain, two princes, both recognizing the same spiritual authority and the same international law, had to agree on the acquisition of land belonging to princes and peoples of another faith. Even though a contractual agreement led to the establishment of the line, in the background these princes still shared the authority of a common *ordo* and a common arbitrational authority which, as the last instance of international law, distinguished between the territory of Christian and non-Christian princes and peoples. Even if at that time the pope did not allocate the ownership of lands but only the freedom of missions,[6] this shared authority was also an expression of a spatial order which distinguished between the spheres of influence of Christian and non-Christian princes and peoples.

In practice, areas free for missions were not separated from those of navigation and trade. Thus the *raya* presupposed that Christian peoples and princes had the right to be granted a missionary mandate by the pope, on the basis of which they could pursue their missionary activities and, in due course, occupy non-Christian territories. Even Francisco de Vitoria's D*e indis y de iure belli relectiones* [hereafter, *relectiones*],[7] which begins in an astonishingly objective manner, ends with the claim that the Spanish are

6. Julius Goebel emphasizes this point in *The Struggle for the Falkland Islands* (New Haven: Yale University Press, 1927), p. 84; so also does Grewe in "Die Epochen der modernen Völkerrechtsgeschichte," *ibid.*, p. 51. One should not overemphasize this antithesis lest one lose sight of the latent spatial concept of papal missionary mandates. The papal edict of May 4, 1493 speaks first of the expansion of "*fides catholica*" and "*christiana lex*" and of the conversion of barbarian peoples, but it also contains the "*donatio*" of territories as in feudal law and expressly makes the heirs of Castile and Leon into "*dominos cum plena libera et omnimoda potestate, auctoritate et jurisdictione.*" Just how easily and almost matter-of-factly the freedom of missions and the *liberum comercium* became a legal title of *bellum iustum* and thus a right to occupation and annexation is best seen if one compares Vitoria's initial thesis with its end result. Cf. *Las relecciones de Indis y de iure belli*, ed. by Javier M. Barcels, with a reproduction of the Latin text from the 1696 ed. (Wash. DC: Union Panamerica, 1963), Sec. III, *de titulis legitimis quibus barbari potuerint venire in ditionem Hispanorum*, especially pp. 7ff. With Vitoria the right of land appropriation appears in the *Septima conclusio*, in the explication of the legal title for the subjugation of barbarians by the Spaniards (because, in view of the refusal to concede the freedom of missions and free trade, they were waging a just war).

7. [Tr.] Francisco de Vitoria (1486?-1546) was Primary Professor of Sacred Theology at the University of Salamanca. There are many editions of his r*electiones* with varying titles in Spanish and Latin. Schmitt relies on Francisco de Vitoria, *relectiones teologicas*, a critical edition in three volumes, with facsimiles, prepared by Luis G. Getino, published by the Asociation Francisco de Vitoria (Madrid: Impr. La Rafa, 1933-35), Vol. I. For this translation, I rely on another edition known to Schmitt, *De indis de iure belli relectiones* (Washington DC: The Carnegie Institution, 1917), ed. by James Brown Scott, which contains the sections on *De indis* and *De iure* (published together in most editions) extracted from Vitoria's posthumously published *Relectiones teologicae* XII.

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waging a just war and therefore may annex Indian lands if the Indians resist free *commercium* (not only "trade") and the free mission of Christianity.

The global line of the *raya* itself, however, did not as a rule concern the division of Christian and non-Christian territories. It was only an internal division, within the framework of a spatial order, between two land-appropriating Christian princes. Accordingly, *rayas* were based on a consensus in international law concerning land appropriation, whereby there was still no distinction between land and sea appropriations. Those Christian princes and peoples engaged in land and sea appropriations, still within the spatial order of the *respublica Christiana* of the Middle Ages, had a common ground in their Christian faith and a common authority in the head of the Church, the Roman pope. Thus they recognized each other as equal parties to a treaty of division and distribution concerning land appropriation.

2. Although *amity lines* were related to European land and sea appropriations of the New World, they were based on completely different premises. The amity lines in question appeared for the first time (and at first were agreed upon only verbally) in a secret clause in the Treaty of Cateau Cambrésis.[8] Essentially, they belong to the age of religious civil wars between land-appropriating Catholic powers and Protestant sea powers. They were an important part of European international law during the 17th century, when jurists hardly knew what to make of them and treated them perfunctorily under the category of "truce."[9] Yet they were acknowledged explicitly in many important treaties of European land-appropriating powers.[10] Even when amity lines were disclaimed and (as, e.g., in the English-Spanish Treaty of November 15, 1630) it was agreed that prizes won beyond the equator also should be returned,[11] this principle remained in force, i.e., that treaties, peace and friendship applied only to Europe — to the Old World, the area on this side of the line.

Even the Spaniards occasionally asserted that otherwise valid treaties did not hold in "India" because this was a "new world."[12] The fact that

8. See Davenport, *European Treaties*, *op.cit.*, Doc. 21, pp. 219ff.

9. According to Pufendorf, in *Ius Naturae et Gentium* (Bk. VIII/Ch. 7), a truce is usually general in that it can also be limited locally. To date there is still no scholarly monograph on the question of "lines" in the international law of the 17th and 18th centuries.

10. This is true in the English-Spanish negotiations and in the French-Spanish Treaty of 1604. See Davenport, *European Treaties*, *op.cit.*, p. 248.

11. *Ibid.*, p. 306. The note on this Treaty in the subject index may give the false impression that it put an end to amity lines, which of course is not the case.

12. *Ibid.*, p. 248 (on the occasion of the Spanish-English Treaty of August 18-28, 1604).

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the lines also gave free rein for looting, especially to English "privateers," is understandable and generally recognized. In its own specific way, the French government, given its purely political stance with respect to the religious wars of the 17th century, had every reason to appeal to the "line." The fact that the thoroughly Catholic King of France aligned himself with dangerous heretics and wild pirates, freebooters and buccaneers, against the Catholic King of Spain and, together with such allies, pillaged Spanish cities in the Americas, can only be explained by the fact that these pirate raids were undertakings "beyond the line."[13]

Geographically, these amity lines ran along the equator or the Tropic of Cancer in the south, along a degree of longitude drawn in the Atlantic Ocean through the Canary Islands or the Azores in the west, or a combination of both. The cartographical problem of the precise determination of the line was very important, especially in the west, and resulted in explicit official regulations. Thus Cardinal Richelieu made a declaration in the name of the French king on July 1, 1634, according to which French seafarers were forbidden to attack Spanish and Portuguese ships on this side of the Tropic of Cancer, but were given liberty to do so beyond this line if the Spanish and Portuguese refused them free access to their Indian and American lands and seas. All pilots, hydrographers, map makers, globe makers and engravers were forbidden to change any aspect of the old meridians or to draw any western meridian other than that of the old Ptolymaic zero meridian which ran across Ferro Island in the Canary Islands. It was forbidden, under any pretext, to shift the western meridian beyond the Azores.[14]

At this "line" Europe ended and the "New World" began. At any rate, European law — "European public law" — ended. Consequently, so did the bracketing of war achieved by the former European international law, meaning that the struggle for land appropriations knew no bounds. Beyond the line was an "overseas" zone in which, for want of any legal limits to war, only the law of the stronger applied. The characteristic feature of amity lines consisted in that, different from *rayas*, they defined a sphere of conflict between the two contractual parties seeking to appropriate land

13. Cf. the King of France's record in M. L. E. Moreau des Saint-Méry, *Loix et constitutions des colonies françaises de l'Amérique sous le vent*, Vol. 1, 1550-1703 (Paris: Chez l'auteur, 1784), p. 179.

14. *Ibid.*, pp. 25-27. Richelieu's order was based on the consultations of a scholarly conference. It is well-known in the history of geography, but its relation to the question of amity lines, significant both politically and in terms of international law, is largely ignored by geographers. Cf., for example, Hermann Wagner, *Lehrbuch der Geographie*, Tenth Edition (Hannover: Hannsche Buchhandlung, 1920), Vol. I, p. 65.

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precisely because they lacked any common presuppositions and authority. In part, however, these parties still shared the memory of a common unity in Christian Europe. But the only matter they could actually agree on was the *freedom* of the open spaces that began beyond the line.

This freedom consisted in that the line set aside an area where force could be used freely and ruthlessly. It was understood, however, that only Christian-European princes and peoples could share in the land appropriations of the New World and be parties to such treaties. But the commonality of Christian princes and nations contained neither a common, concrete and legitimating arbitrational authority nor any principle of distribution other than the law of the stronger and ultimately of effective occupation. The general concept was then necessarily that everything which occurred "beyond the line" remained outside the legal, moral and political values recognized on this side of the line. This was a tremendous *exoneration* of the internal European problematic. The significance of the famous and notorious expression "beyond the line" in terms of international law lies precisely in this exoneration.

A closer juridical consideration of amity lines in the 16th and 17th centuries reveals *two* types of "open" spaces in which the activity of European peoples proceeded unrestrained: first, an immeasurable space of free *land* — the New World, America, the land of freedom, i. e., land free for appropriation by Europeans — where the "old" law was not in force; second, the free *sea* — the newly discovered oceans conceived by the French, the Dutch and the English as a realm of freedom.

The freedom of the seas is a problem of spatial ordering of the utmost importance in international law. Completely land-bound in their thinking, Roman jurists confounded the issue from the beginning with such civil concepts as "*res communis omnium*" and "matters of common use." In this respect, even the thinking of British jurists of the time, such as Richard Zouche and Henry R. Selden, was still land-bound. In reality, it was not Roman law that broke through in the 16th century with respect to the freedom of the seas, but something else entirely, i.e., the old, elemental fact that law and peace were originally only in force on land. But even on the firm land of the "new earth" — on American soil — there was as yet no location of law for Christian Europeans. For them, there was only as much law as the European conquerors brought with them and set down, be it through their Christian missions or the establishment of a European system of justice and administration. The structure of European international law which emerged at that time was based on this link between two "new" spaces — "free" spaces in the sense they were not embraced by the former European order of firm land.

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Such a division of free spaces recognized by Christian governments had universal repercussions. It challenged all traditional intellectual and moral principles. The catastrophe affected all the new theories and formulas of the 17th century to the extent they were modern — to the extent they replaced the old theories and formulas inherited from antiquity or the Christian Middle Ages. Today, many of these 17th century ideas are still regarded abstractly and cited often. Their historical connection with the "free" spaces of that century and with the designation of a conflict zone is mostly disregarded and forgotten. For this reason, a few examples should be mentioned.

First is Pascal's famous statement: "A meridian decides the truth."[15] One should not impute to this expression of pain and astonishment a general, relativistic skepticism consistent only with the facts of the matter as considered in the many deviations of positive law in various countries and various times. It does not deal with such banalities, but rather with a fact almost inconceivable to a person of Pascal's mind, i.e., that in certain areas Christian princes and peoples had agreed to disregard the distinction between justice and injustice. Pascal's meridian is actually nothing but the amity lines of his time, which had created an abyss between freedom (the lawlessness of the state of nature) and an orderly "civil" mode of existence.

Second is Thomas Hobbes' doctrine of the state of nature in his construction of the state. For Hobbes, the state of nature is a domain of werewolves in which man is nothing but a wolf among other men, just as "beyond the line" man confronts other men as a wild animal. The axiom *homo homini lupus* has a long history which here, with the land occupation of the New World, suddenly becomes intense and virulent. Vitoria, in his *Relectiones*, explicitly opposes the old formula *homo homini lupus*, which goes back to Plautus and Ovid, with his own *homo homini homo*. He says: "*non enim homini homo lupus est, ut ait Ovidius, sed homo.*" Vitoria denied the formula *homo homini lupus* as well as its opposite, *homo homini Deus*,[16] cited by Francis Bacon and Hobbes, and later by Ludwig Feuerbach.[17] Then, in the middle of the 19th century, it was buried by a contemporary of Karl Marx: Max Stirner.[18] However, in the 16th and 17th centuries *homo*

15. In its larger context, the passage reads: "*Trois degrés d'élévation du Pôle renversent toute la Jurisprudence. Un Méridien décide de la vérité, ou peu d'années de possession. Les lois fondamentales changent. Le droit a ses époques. Plaisante justice qu'une rivière ou une montagne borne! Vérité en deça des Pyrenées, erreur au delà.*" (The Faugère edition puts a comma rather than a period between "*possession*" and "*les lois fondamentales.*")

16. This formula can be traced to Plinius, *Naturalis historia* II\7.

17. Ludwig Feuerbach, *Das Leben des Christentums* (Leipzig: O. Wigand Verlag, 1841), p. 402.

18. Max Stirner, *Der Einzige und sein Eigentum* (Leipzig: O. Wigand Verlag, 1845).

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homini lupus was revived and acquired a concrete meaning with amity lines because now it was localized — it acquired its own space, recognized by Christian Europeans, and thereby an unmistakable validity.

Hobbes' *homo homini lupus*, stemming from a newly-discovered area of freedom, was the 17th century's response to Vitoria's repudiation of this heathen formula. In this respect, Hobbes obviously was influenced not only by the civil wars in Europe but also by the New World. He speaks of the "state of nature," but not in the sense of a spaceless utopia. His state of nature is a *no-man's-land*, but this does not mean it exists *nowhere*. It can be located, and Hobbes locates it, among other places, in the New World. In *Leviathan* "the Americans" are an example of the wolf-character of men in the state of nature; and *Behemoth* refers to the atrocities committed by Spanish Catholics in the kingdom of the Incas. In other places, especially in the later stages of Hobbes' intellectual development, the elaboration of concepts takes precedence over concrete experiences in time and space. The state of nature is treated less as a historical fact and more as a hypothetical construct. But this did not diminish the contemporary historical significance of amity lines.[19]

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19. "It may peradventure be thought, there was never such a time, nor condition of war as this; and I believe it was never generally so, over all the world: but there are many places, where they live so now. For the savage people in many places of America, except the government of small families, the concord whereof dependeth on natural lust, have no government at all; and live at this day in that brutish manner, as I said before." *The English Works of Thomas Hobbes of Malmesbury*, ed. by Sir William Molesworth (1839), Vol. III *Leviathan, or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil* (Aalen: Scientia Verlag, 1966), Ch. 13, p. 114. My presentation of Hobbes' theory of the state of nature does not take into account the historical relation to amity lines. See my 1938 book, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, tr. by George Schwab and Erna Hilfstein (Westport: CT: Greenwood Press, 1996). But this relation is very important, also in the history of philosophy. Hegel's construction of the state is reminiscent of Hobbes' construction. Consequently, for Hegel America is a civil society without a state. Ferdinand Tönnies, who knows Hobbes better than anyone, has demonstrated in a masterful article how Hobbes increasingly "deepened" his concept of the state of nature. See Tönnies, "Hobbes und das Zoon Politikon," in *Zeitschrift für Völkerrecht*, Vol. XII (1923), pp. 471-88. That is correct, but it need not give rise to sterile antitheses of Being and Thought or to those distinctions neo-Kantian epigones have utilized to empty philosophy of all historical content. A scholar like Tönnies was far removed from this sort of epigonism. Historically speaking, Hobbes can only be understood in terms of his time, and characteristic of his time were *lines* and the new, seemingly unlimited spaces of what was then a very concrete *freedom*. This does not rule out the possibility that he also had in mind with his "state of nature" the anarchy of feudal conditions of the expiring Middle Ages. Leo Strauss and Franz Borkenau have rightly pointed to this historical connection between the state of nature and feudalism, respectively in "Comments on Carl Schmitt's *Der Begriff des Politischen*" (1932), appendix to Carl Schmitt, *The Concept of the Political*, tr. by George Schwab (New Brunswick, NJ: Rutgers University Press, 1976), pp. 87ff. ; and *Der Übergang vom feudalen zum bürgerlichen Weltbild* (Paris: Felix Alcan, 1934), p. 458.

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Third is a remarkable statement by John Locke, the great opponent of Hobbes. Also in Locke, concepts of the "state of nature" are linked in terms of contemporary history to the "New World." This state of nature, however, already has become a tolerable state of society and is no longer the old one "beyond the line." Remember that Locke's work is almost contemporaneous with the treaties of Nymwegen and Utrecht (1713), i. e., near the end of the heroic age of piracy. However, given the historical evaluations of Locke's doctrine of the state of nature and his model of society, also keep in mind the remarkable statement (made by an alleged rationalist at the beginning of the 18th century) that best elucidates the historical and spatial context of his thought: "In the beginning all the world was America."[20] The astonishing transformation of consciousness which occurred toward the end of that century affected notions of the state of nature as well as their location in America: the New World.

The significance of amity lines in 16th and 17th century international law lay in that great areas of freedom were designated as conflict zones in the struggle over the distribution of a new world. As a practical justification, one could argue that the designation of a conflict zone at once freed the area on this side of the line — a sphere of peace and order ruled by European public law — from the immediate threat of those events beyond the line, which would not have been the case had there been no such zone. The designation of a conflict zone outside Europe contributed also to the bracketing of European wars. This is the significance and justification of amity lines in international law.

Although the idea of designating a sphere outside the law and open to the use of force has a long history, until very recently this type of thinking remained typically English — it became increasingly foreign to the state-centered legal thinking of continental European nations. For this reason, English law has preserved a better sense for the particularities of different territorial statuses than continental legal thinking, which even in the 19th century obtained only in a single territorial status: the state. The diversity of colonial possessions and the distinction between dominions and non-dominions kept alive the English sense for specific spatial orders and variations of territorial status.

English law also clearly distinguished between English soil — those areas ruled by common law — and other spatial areas; common law was regarded as the law of the land, as *lex terrae*. The power of the king was

20. See John Locke, *On Civil Government*, Bk. II, 49; see also Emil Roos' dissertation on John Locke's contractual theory and the state of nature (1943).

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considered absolute on the seas and in the colonies, while in his own country it was subject to common law and to estate or parliamentary limits of English law. The first struggle of the parliamentary opposition to King James I was over the issue of whether he should be allowed to extend the realm of the seas in order to levy tolls at will and without parliamentary restrictions. Arthur Duck still maintained (around 1650) that Roman law rather than land law was in force on the seas.[21]

This restriction of law to the land and to one's own territory has a long tradition in legal history. It has been characterized sociologically as "land-locked morality."[22] In my view, it is simply a matter of the age-old maxim: "All law is law only in a particular location." Thus it is historically more correct to focus on the relation between order and location — the spatial context of law. Then the idea of amity lines and of an area designated as free of law becomes easily understandable as an antithesis to law in the Old World — to an old law in a particular location.

The English construction of a state of exception, of so-called martial law, is obviously analogous to the idea of a designated zone free of law. In France, the state of exception as a state of siege became a recognized legal institution in the course of the 19th century. By contrast, English martial law remained limited — a suspension of all law for a certain time and in a certain space. In terms of time, it begins with the declaration of martial law and ends with an act of indemnity; in terms of space, the precise area in which the normal legal order is suspended is specified. Within this context, everything required by the situation is permitted.[23] There is a vivid ancient symbol for this procedure, which Montesquieu also cites: the statue of liberty or justice is veiled for a certain period of time.

In another sense, there is also a historical and structural relation between concepts of the free sea, free trade, free world economy, and

21. Those sentenced to death by the Courts of the Admiralty for murder, piracy or other crimes did not thereby lose their property because Roman law did not recognize this penalty, whereas English law expressly decreed otherwise. Cf. Ernest Nys, *Le droit romaine: le droit des gens et le collège des docteurs en droit civil* (Brussels: M. Weissenbruch, 1910), p. 65.

22. See the excellent article by Michael Freund, "Zur Deutung der Utopie des Thomas Morus," in *Historische Zeitschrift*, Vol. 142 (1930), p. 255.

23. On the English construction of martial law (as opposed to attempts to standardize and institutionalize the state of siege in continental *Rechtsstaat* law, see Carl Schmitt, *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (1921), Fourth Edition (Berlin: Duncker & Humblot, 1978), p. 174; see also Carl Heck, "Der Ausnahmezustand in England," in *Das Recht des Ausnahmezustandes im Auslande, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Vol. 9 (1929), pp. 192ff.

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those of free competition and free exploitation.[24] The "free" spaces so created may appear in the favorable light of zones designated for agonal tests of strength; however, they also may become a desolate chaos of mutual destruction. This is a matter of differently assessed constructions and of the free play of forces. In Hegel's political philosophy, the state appears as a realm of morality and objective reason that rises *above* the non-state sphere of civil society which, according to both Hegel and Marx, is a beastly realm of ruthless (and in this sense, free) egoism. In Hegel's lectures on the philosophy of history, America is characterized specifically as an area lacking a state — an area of civil society. In terms of intellectual history, this is an after-effect of the 16th century practice of contraposing a realm of agonal freedom and civil society to the state as a realm of objective reason. It is also an example of the many variations in which Hobbes' distinction between the natural and the civil condition survived and, in the 19th century, became relevant for the relation between politics and economics as two separate spheres.

3. The third and last global line was the *Western Hemisphere*. In terms of international law, this line was the first counter-attack of the New World against the Old, but its origins traced back both historically and dialectically to the lines that preceded it. As noted, like the English amity lines, the Portuguese-Spanish *rayas* belonged to European land and sea appropriations of the New World. They were spatial divisions which essentially ordered relations between the European powers in these activities. The *raya* had a distributive purpose; even in the Treaty of Tordesillas it is called a "*linea de la particion del mar*." The amity line had an agonal character. The designation of a zone of ruthless conflict was a logical consequence of the fact that there was neither a recognized principle nor a common arbitrational authority to govern the division and allocation of lands.

As long as there was a remnant of spiritual commonality between the land appropriating European powers, the concept of "discovery" was sufficient. Effective occupation — the *status quo* of possession consolidated by the states — ultimately became the only title of acquisition in the 19th century. Until then, discovery and the much discussed Roman civil concept of "occupation" were the only legal title to the land appropriation of free territory. This had two consequences: first, it was a long and difficult struggle before a land appropriation was accepted as real and permanent or even recognized in any form by rival powers; second, war came to be

24. Schmitt, "Raum und Grossraum im Völkerrecht," in *Zeitschrift für Völkerrecht*, *op. cit.*, pp. 164ff.

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judged in terms of its outcome, i. e., war became the recognized legal means of changing the *status quo* of any given possession. A rationalization, humanization and legalization — a bracketing — of war was achieved against this background of global lines. This occurred, at least with respect to continental land war in European international law, by the limitation of war to a military relation between states.

Only after the new spatial order based on states was achieved in Europe did the third and last global line of the Western Hemisphere appear. With it, the New World autonomously opposed the traditional order of Europe and of Eurocentric international law. In so doing, it radically challenged the basis of this old spatial order. In terms of intellectual history, this began already in the 18th century with the War of Independence and the application of Rousseau's state of nature to those states freeing themselves from England and Europe. Yet the practical effects of this global line of the Western Hemisphere began only in the 19th century, then developed fully and irresistibly in the 20th century. Thus it is first necessary to discuss the formation of the spatial order of the international law established between European states and the bracketing of war achieved thereby. Only then, and above all, only by contrasting different concepts of war can we appreciate the significance of the Western Hemisphere in international law. This line made it possible to upset the spatial order of the European world and to introduce a new concept of war into world history.

Justification of the Land Appropriation of a New World

For 400 years, from the 16th to the 20th century, the structure of European international law was determined by a fundamental course of events — the conquest of the New World. Then, as later, there were numerous discussions about relevant legal and moral questions.[25] There were also numerous individual positions taken with respect to the justice or injustice of the *conquista*. Nevertheless, the fundamental problem — the justification of European land appropriations as a whole — was seldom addressed in any systematic way outside moral and legal questions. In fact, only one monograph deals with this problem systematically and

25. An overview of 16th century literature can be found in Lewis Hanke, *Cuerpo de Documentos del Siglo XVI sobre los Derechos de Espana en las Indias y Filipinos*, Edited by Augustin Milliares Carlo (Mexico: D. F. Fondo de Cultura Económica, 1943), pp. 315-336; and Hanke, *The Spanish Struggle for Justice* (Philadelphia: University of Pennsylvania Press, 1949). A presentation of the diverse arguments can be found in Joseph Höffner, *Christentum und Menschenwürde, das Anliegen der spanischen Kolonialethik im goldenen Zeitalter* (Trier: Paulinus Verlag, 1947).

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confronts it squarely in terms of international law. Originating in the first stage of the *conquista*, it directly posed the fundamental question of the future legal title to the great land appropriation and answered it completely in line with the scholastic method. It is the famous *relectiones* of Francisco de Vitoria. Given the intellectual courage these lectures exhibited in posing questions and the perfection of their scholastic method, they influenced and dominated all further discussions of the problem. Of course, they have also been misunderstood and misused.

Vitoria's theses obtained within a scholastic-theological debate and appertained to late Spanish scholasticism. Until now, there has been no comprehensive treatment of this great European intellectual achievement dating from the time of Charles V and Philip II. Such a comprehensive treatment, as the German theologian and authority on late scholasticism Karl Eschweiler rightly observed, "could only be written in Spain and only by a Spaniard."[26] Here I will discuss, from the standpoint of contemporary scholarship in international law, Vitoria's place in legal history and the scholarly uses of his much-cited lectures, whose interpretation has its own history.

Vitoria's Scholastic Objectivity. A contemporary reader's first impression of Vitoria's *relectiones* is one of extraordinary impartiality, objectivity and neutrality. Consequently, the argumentation appears no longer medieval but "modern." Seven *tituli non idonei nec legitimi* and the same number of *tituli legitimi* are discussed in varying detail and with equal objectivity.[27] Accordingly, all legal titles of the pope and the emperor deriving from claims to world domination are rejected unconditionally as inappropriate and illegitimate. This impression of total objectivity and neutrality is also sustained elsewhere. In particular, it is repeatedly emphasized that native Americans, though they may be barbarians, are not animals and are no less human than the European land appropriators. Though not explicitly stated, this amounted to a rejection of a particular type of argument put forward at that time, especially in various justifications of

26. Karl Eschweiler, *Die Philosophie der Spätscholastik. Spanische Forschungen der Görresgesellschaft*, Vol. I (Münster: Aschendorff, 1928), p. 264.

27. The seven *tutili non idonei nec legitimi* are: imperial world domination, papal world domination, *ius inventionis* (discovery), the rejection of Christianity, the crimes of barbarians, the ostensibly free consent of the Indians, and special divine conferment. The seven *idonei ac legitimi* for a just war are: *ius commercii*, *ius propagandae fidei*, *ius protectionis* (of the Indians converted to Christianity), *ius mandati* (papal mandate), *ius interventionis* (against tyranny), *ius liberae electionis*, and *ius protectionis sociorum*.

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the *conquista*, by the humanist Juan Gines Sepúlveda (1490-1573), historiographer of Charles V and teacher of Philip II, for whom Las Casas[28] was an *hombre enemigo* and a *sembrador de discordias*.

Sepulveda presented the natives as savages and barbarians (with reference to Aristotle) in order to place them outside the law and to make their land free for appropriation. At the beginning of the *conquista*, it had been argued that the Indians worshiped idols, sacrificed humans, and were cannibals and criminals of every sort. Aristotle's statement in the first book of his "Politics" that a barbarian is "by nature a slave" was often cited,[29] and Sepúlveda is even reported to have said: "Spaniards stand above barbarians as men above the apes."[30] Thus to deny the Indians human qualities on such grounds had the practical aim of obtaining a legal title for the great land appropriation and of *subjugating* the Indians which, incidentally, even Sepúlveda considered only servitude (*servidumbre*) — not slavery (*esclavitud*).

This Aristotelian argument was inhuman in its outcome, but it derived

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28. [Tr.] Bartolomá de Las Casas (1474-1566), known to posterity as "The Apostle of the Indies," was the first priest ordained in the American colonies. Having developed a scheme for the complete liberation of the Indians, in 1530 he met Sepúlveda in public debate on the latter's recently published *Apologia pro libro de justis belli causis*, which maintained the lawfulness of waging unprovoked war against the natives of the New World.

29. "For that which can foresee by the exercise of mind is by nature intended to be lord and master, and that which can with its body give effect to such foresight is a subject, and by nature a slave; hence master and slave have the same interest." *The Basic Works of Aristotle*, Edited and with an Introduction by Richard McKeon (New York: Random House, 1941), "Politica," Bk I: Ch. 2, p. 1128.

30. See the document of Democrates alter (or secundus), written in 1547 but not published at that time (owing above all to the opposition of Las Casas). It was first published by M. Menéndez Palayo under the title "J. Genesi Sepúlvedar cordubensis Democrates alter, sive de justis belli causis apud indos," in *Bolitin de la Real Academia de la Historia*, Vol. XXI (October 1892), No. 4, pp. 260-369. Sepúlveda's first "Democrates" dialogue (*De convenientia miiitaris disciplinae cum Christiana religione dialogus cui inscribitur Democrates*) was published in Rome in 1535. Cf. Teodoro Andres Marcos, *Vitoria y Carlos en la soberania hispano-americana* (Salamanca: Imprentie Commercial Salmantina, 1937), pp. 178ff.; also, Ernest Nys, "Les Publicistes Espagnols du XVIe siècle et les droits des Indiens," in *Revue de droit international et de législation comparée*, Vol. XXI, (1899), p. 550. Since then the literature on Sepúlveda has proliferated. Unavailable to me was a study by Manuel Gaicia Pelayo in *Juan Ginés de Sepúlveda tratado las justas causas de la guerra contra los indios* (Mexico: Fondo de Cultura Económica, 1941). On Sepúlveda's struggle with Las Casas, see Benno Biermann, "Der Kampf des Fray Bartolomé de las Casas um die Menschenrechte der Indianer," in *Die neue Ordnung*, Vol. 2, No. 1/2 (March 1948), pp. 36f., and P. Honorio Munoz, O.P., *Vitoria and the Conquest of America*, Second Edition (Manila: University of Santo Tomas Press, 1938), p. 56 (the disputation of 1550 in Valladolid at which Sepúlveda was defeated). See also Höffner, *Christentum und Menschenwürde*, *op.cit.*, pp. 169 and 177-180.

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from a particular concept of humanity — the higher humanity of the conqueror. It has an interesting history. Its classic formulation is found first in the writings of the English philosopher Francis Bacon, whose tenets were adopted by Barbeyrac in his commentary on Pufendorf's concept of natural law.[31] Bacon said the Indians were "proscribed by nature itself" as cannibals. They stood outside humanity (*hors l'humanité*) and had no rights. It is by no means paradoxical that none other than humanists and humanitarians put forward such inhuman arguments because the idea of humanity is two-sided and often lends itself to a surprising dialectic. Given the coherence of this two-sided aspect of the idea of humanity, it should be remembered that Bacon also opposed the axiom *homo homini Deus* to that of *homo homini lupus*.

In the Germany of the humanitarian 18th century one probably would have used the word "inhuman" for this other aspect of humanity. At that time the word emphasized the discriminatory power of division inherent in humanitarian ideology. Of course, the division between human and inhuman had a political meaning and could with some justification be traced back to Aristotle's "Politics." In this extreme form, it was no longer Christian. But in the 18th century it was consistent with the victory of a philosophy of absolute humanity. Only when man appeared as the embodiment of absolute humanity did the other side of this concept appear in the form of a new enemy — the *inhuman*. The expulsion of the inhuman from the human was followed in the 19th century by an even deeper division between the *superhuman* and the *subhuman*. Just as the human presupposes the inhuman, so with dialectical necessity the superhuman entered history with its hostile twin: the subhuman.

In Vitoria's time, the argument that the Indians were cannibals and barbarians was in practice very widespread and often not unfounded. Nevertheless, in spite of Sepúlveda, it did not have yet the inhuman-humanitarian power to divide that it acquired in later centuries. The 16th century was still too deeply Christian, especially in Spain, given the worship of Mary as the Immaculate Virgin and Mother of God. In the general legal arguments of the 16th and 17th centuries, the inhuman-humanitarian distinction did not stand out as primary, although the higher European civilization did become a standard justification for colonization. Practically speaking, discrimination based on biological arguments was at that time unknown. Yet Hugo

31. [Tr.] The fame of the French jurist Jean Barbeyrac (1674-1744) rests chiefly on the preface and notes to his translation of Pufendorf's treatise, *De iure naturae et gentium*. In fundamental principles, he followed almost entirely Locke and Pufendorf.

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Grotius, in his dissertation, *De origine gentium americanarum* (1642), claimed the North America Indians were racially Nordic and descended from Scandinavians. That did not protect them from extermination.

For Christian theologians, the natives were human beings and bearers of an immortal soul. St. Augustine had said: *Gentes licet barbarae tamen humanae.*"[32] The formula "*homo homini lupus*" and the Aristotelian axiom that some people are "slaves by nature" are dismissed by Vitoria as heathen. To both he explicitly opposes his own *homo homini homo.*[33] This threefold *homo* has a somewhat tautological and neutralizing ring; it sounds Erasmian, but it is still meant to be Christian. Thus it is not surprising that Vitoria proceeds from Christian truth and emphasizes that non-Christian Indians may not be deprived of their rights for the benefit of Christian Europeans. But the general quality of being human need not level out the social, legal and political distinctions developed in the course of human history. Vitoria also recognizes that barbarians need guidance. For him, war against non-Christians is something different than war between Christians. Even though all Christian theologians knew that nonbelievers — Saracens and Jews — were human beings, the international law of the *respublica Christiana*, with its profound distinctions between various types of enemies and consequently also of wars, was based on profound distinctions between human beings and on great disparities in their status.

Rejecting the contrary opinions of other theologians, Vitoria treats Christians and non-Christians as equals in legal terms, at least from the standpoint of international law. Neither the pope, who has only spiritual power, nor the emperor, who is by no means the ruler of the world, nor any Christian prince can do as they wish with non-Christian peoples and their lands. As with the princes and peoples of Christian lands, barbarian princes in non-Christian lands also have authority (*iurisdictio*) and the native inhabitants also have ownership (*dominium*) of their soil. This view gained general acceptance among Spanish and non-Spanish authors alike in the 16th century. Consequently, a Spaniard professing Christianity had no direct right to appropriate the land of non-Christian princes and peoples. According to Vitoria, the right to

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32. Saint Augustine, *The City of God*, Tr. by Marcus Dods (New York: The Modern Library, 1950), Bk. I/14: "He has not failed His own people in the power of a nation which, though barbarous, is yet human . . . ," p. 19.

33. In the discussion of the first *titulus legitimus*, at the end of the second *proposito*, we read: "*Non enim homo homoni lupus est, ut ait Ovidus, sed homo*" in Vitoria, *Relecciones teologicas*, *op. cit.*, Vol. I, pp. 384f.

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appropriate land arose only indirectly, and this only by way of arguments in favor of a just war.

As already noted, it was not surprising that a Christian moral theologian would refuse to discriminate against non-Christians. In the case of Vitoria, however, at stake were actual political questions of great and immediate significance — those concerning the land appropriation of a new world. This is why his theoretical conclusions, though they refer only to his arguments and avoid any practical decisions, can be astonishingly provocative and be misinterpreted, especially when taken out of context and divorced from the coherence of his thinking, then generalized as abstract principles of international law in a manner approaching the completely secularized and neutralized thinking of a modern scholar. Vitoria's seemingly unlimited objectivity and neutrality, based on his own wide-ranging generalizations, naturally suggested and inspired even more wide-ranging generalizations. One example of his neutralizing arguments best demonstrates his approach, i.e., his treatment of whether discovery as such constitutes a legal title for the acquisition of discovered land.

Discovery was the recognized basis for a true legal title from the 16th to the 18th century. For Vitoria, it was not a legitimate title of acquisition, even for the discovery of a new world. Apparently, neither did it constitute for him any special entitlement to acquisition nor any foundation for a legal title, not even in the case of what would be called 'inchoate title" in 19th and 20th century international law.[34] Evidently, events which today are considered enormously significant did not impress him, or at least did not have any great moral impact on him at the time. Nor does he mention that the Spanish discoverers and conquerors took with them the sacred image of

34. This concept of "inchoate title" was developed in the 19th century, in particular by English jurists — Sir Travers Twiss [1809-1897], Sir Edward Marshall Hall [1858-1927], Sir Robert Joseph Phillomore [1810-1885], John Westlake [1828-1913] and Lassa Francis Lawrence Oppenheim [1858-1919]. A more recent work on this problem is Mark F. Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice relating to Colonial Expansion* (London and New York: Longmans, Green & Co., 1926), pp. 146ff., where in general it means: "Discovery gives only an Inchoate Title." From the practice of the International Court of Justice, of particular note is the decision of its president, Max Huber, of April 28, 1928 regarding the American-Dutch dispute over the island of Las Palmas, as well as the proceedings in the Hague regarding Greenland (the decision of April 5, 1933). On this last, see Franz Fuglsang, "Der Standpunkt der Parteien im Grönland-Konflikt," in *Zeitschrift für Politik*, Vol. 33 (1933), No. 6-7, p. 748; Ernst Wolgast, "Das Grönland-Konflikt des Ständigen Internationalen Gerichtshof vom 5. April 1933," in *Zeitschrift für öffentliches Recht*, Vol. VIII (1933), p. 573; Fritz Bleiber, *Die Entdeckung im Völkerrecht*, *Greifswalder rechtswissenschaftler Abhandlungen*, Vol. 3 (1933), pp. 63f.

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Mary to demonstrate their piety and justify their historical acts. His ahistorical objectivity goes so far that he not only ignores completely this Christian-Marian symbol but also the humanitarian concept of "discovery" so laden with history in the modern view. From a moral standpoint, the New World for him was not new, and the moral problems it entailed could be handled by the immutable concepts and standards of his scholastic system of thought. In historical reality, the further development of the struggle for America was determined by global lines — especially amity lines. Of course, for Vitoria recognition or even acceptance of lines beyond which the distinction between justice and injustice was suspended was nothing but a sin and an appalling crime.

The profound distinctions within the concept of "enemy," as well as those consequent elemental distinctions between regulated and unregulated wars — the specific limitations of war which developed within a spatial order in international law and emerged so prominently in the international law of the Christian Middle Ages — are also subsumed in Vitoria's assumption of the general equality of mankind. Spaniards are and remain the barbarians' fellow-men. There is also the Christian duty to "love thy neighbor," and every person is our "neighbor." Concretely speaking, this was the basis of the moral and juridical conclusion that all the Spaniards' rights *vis-à-vis* the barbarians were also valid in reverse — they were reversible as *iura contraria*, as rights of barbarians *vis-à-vis* Spaniards — unconditionally reciprocal and invertible. If Christians and non-Christians, Europeans and non-Europeans, civilized peoples and barbarians have equal rights, all concepts are necessarily reversible. Consequently, with respect to discovery and occupation, such a legal title (*occupatio bonorum nullius*) was of no more use to Spaniards than if the reverse had been the case — if Indians had discovered them: *non plus quam si illi invenissent nos*.[35]

Although stated only with reference to the legal title of *occupatio*, today this already sounds like an all-too abstract, neutral, apathetic and thus ahistorical exaggeration. In another passage, Vitoria claims barbarians have no more right to exclude Spaniards from trade and legal commerce than have Spaniards to exclude Frenchmen.[36] Apparently, Europe for him was no longer the center of the earth and the source of all standards. He no

35. This passage is found in the Getino edition of Vitoria, *Relecciones teologicas*, *op. cit.*, Vol. II, p. 333. I was unable to find this passage in the reprints of the first volume of this edition. All quotations from Vitoria should be considered with the reservation that there is no authentic — authorized — edition of his works.

36. *Ibid.*, Vol. I, p. 387; Vol. II, p. 334.

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longer recognized the spatial order of the medieval *respublica Christiana* with its distinction between the territory of Christian peoples and that of heathens or nonbelievers. Today, it is still understandable how someone would be outraged by Pizarro's cruelty. Vitoria later wrote in a letter with clear reference to Sepúlveda: "The Indians are human beings and not apes." But what would the representatives of modern civilization say about the fact that Vitoria says nothing about the right of a superior civilization or culture, the right of civilized peoples to rule over half-civilized or uncivilized peoples, or about "civilization" — a decisive concept in European international law since the 18th century?

This demonstrates the deep antithesis between the scholastics' ahistorical approach and a historical mode of thinking, in particular the 19th century humanitarian philosophy of history. In his lectures on the philosophy of history, Hegel argues that the culture of the Mexicans and the Peruvians "had to perish as soon as the [world-]spirit approached them." This thesis exhibits the self-conscious arrogance of an idealist philosophy of history. But even so critical and pessimistic a 19th century historian as Jacob Burckhardt still refers to what he calls "the sovereign right of culture to conquer and subjugate barbarians which, after all, is conceded by most people." Vitoria has an entirely different attitude. Not even the emergence of a new continent and a new world led him to adopt historical arguments based either on a Christian view of history or on the ideas of a humanitarian-civilizing philosophy of history. The lack of any historical concept at such a crucial time had to lead to a suspension and displacement of the predominant Eurocentric view of the world and of history in the *respublica Christiana* of the Middle Ages.

Vitoria as a Theologian Yet it would be a gross misinterpretation to say Vitoria claimed the great Spanish *conquista* was unjust, although this false assumption is certainly widespread. In the case of some older authors, this can be explained by the political animosity toward Spain. Today, it can be explained simply by superficiality,[37] above all by the modern belief in progress and civilization. Since the destruction of the Christian view of history by the Enlightenment in the 18th century, this belief has become so widely accepted that many no longer grasp (or for that matter even notice) how far removed Vitoria is from such concepts as

37. Marcos, *Vitoria y Carlos V en la Soberania Hispano-Americana*, *op. cit.*; *Mas sobre Vitoria y Carlos V en la Soberania Hispano-Americana* (Salamanca: Imprentie Commercial Salmantina,1939): *Final de Vitoria y Carlos V en la Soberania Hispano-Americana* (Salamanca: Imprimatur de Calatrava, 1942).

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progress and civilization. Further difficulties arise from the fact that Vitoria only examines legal titles and arguments but does not apply them to concrete circumstances and reach his conclusions on this basis.

If today a superficial reader learns that certain legal titles offered to support the *conquista* are rejected as inappropriate, he surmises that this constitutes a general rejection of the *conquista* as such. If he learns of Vitoria's critique of the injustices and cruelties associated with the *conquista*, he understands this as a Rousseauean critique of the age or even as modern propaganda — as a general and civilized condemnation of the *conquista*. In reality, despite his rejection of seven legal titles (including the right of the emperor or the pope to the earth, and the claim that the Indians are morally inferior), Vitoria's view of the *conquista* is ultimately *altogether positive*. Most significant for him was the *fait accompli* of Christianization.[38]

Undoubtedly, Vitoria's exposition is completely ahistorical. The positive conclusion is reached only by means of general concepts and with the aid of objective arguments in support of a just war. Here the neutral and hypothetical character of his thinking is particularly striking. *If* barbarians opposed the right of free passage and free missions, of *liberum commercium* and free propaganda, then they would violate the existing rights of the Spanish according to *ius gentium*; *if* the peaceful entreaties of the Spanish were of no avail, then they had grounds for a just war. In terms of international law, a just war provided the legal title for occupation and annexation of American territory and subjugation of the indigenous peoples. There were additional grounds for a just war by the Spanish against the Americans, which in modern parlance would warrant "humanitarian intervention." Such grounds gave the Spanish rights of occupation and intervention if they were interceding on the part of people being unjustly suppressed in their own country by barbarians. The Spanish right of intervention was deployed in particular on behalf of those Indians who had converted to Christianity.

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38. It did not occur to Vitoria to demand that the *conquista* be reversed or to provide any other people, such as the French or the English, with a mandate for reparation and punishment of the *in bello iniusto versantes*. Here also, his intention is essentially to determine the truth of the arguments rather than to consider the reality of the historico-political situation. The various practical methods of exercising the rights of missions are also not so clearly distinguished by him as in later discussions of this question in which three opposing views are outlined— the apostolic promulgation lacking any force (from the standpoint of Las Casas), the prior subjugation of the peoples to be converted (the practice of the conquistadors), and missionary work under military protection, i.e., under simultaneous military escort (the standpoint of Fernando de Soto). On these three ways of *de procuranda salute indorum*, see above all the description of José de Acosta, S. J. (1588), missionary to Peru, in Höffner, *Christentum und Menschenwürde*, *op.cit.*, pp. 246ff.

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The whole Spanish *conquista* could be justified by means of such general tenets and possible arguments. But Vitoria leaves this question unanswered. A concrete discussion would have to examine the matter case by case. For example, the situation of Cortez in Mexico could be completely different from that of Pizarro in Peru, so that the war in Mexico could prove to be just and the war in Peru unjust. The scholastic account keeps a normative distance from the matter. Its theses are concerned only with arguments; its conclusions are not directly related to the concrete historical case and do not attempt to pass any historical judgments on it.

How can this astonishing neutrality and objectivity be explained? First of all, there should be clarity about the existential situation in which it obtained; it should not be confused with a modern free-floating intelligentsia lacking any presuppositions or standpoints. For this reason, it is necessary to remember that the lectures of the great Dominican do not constitute a juridical treatise similar to international law scholarship in the following centuries. Vitoria was a theologian. He did not claim to be a jurist, still less did he wish to provide arguments for disputes between state governments. He speaks of jurists with a certain condescension.[39] His practical intention is not that of a crown counsel or advocate. Least of all should he be associated intellectually with the likes of Balthasar Ayala, Alberico Gentili, or Richard Zouche, all of whom, being jurists of international law, eschewed theological arguments.

Vitoria speaks as a moral counsellor and teacher of future theologians, above all the moral counsellors of political actors. The relation of a confessor to the concrete situation of a penitent is different than that of a legal counsellor to his client or a justice official to a defendant. The fact that legal questions may have some meaning as questions of conscience for active people is nicely illustrated by the will Ferdinand Cortez left his son upon his death in 1537. The conquistador gave detailed instructions for the reparation of injustices done to the Indians. Even a warrior like Cortez recognized questions of conscience. He also consulted theological moral counsellors. But he certainly would not have thought of allowing the right of his *conquista* to be challenged juridically for moral reasons, even less of turning it over to the advocate of a political enemy.

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39. A disdain for jurists was not unusual at this time. The great Cisneros founded the University of Alcalá without a juridical faculty. "*Nam a civilibus et forensibus studiis adeo natura sua abhorrebat, ut multi serio affirmantem audiverint, quidquid illius disciplinae pectore concepisset, se si fieri posset libenterevomiturum.*" Cf. Marcel Bataillon, *Erasme et l'Espagne: Recherches sur l'histoire spirituelle du XVIe siècle* (Paris: E. Droz, 1937), p. 14.

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As a theologian, Vitoria poses the question of the "right" of the *conquista* and of the *iusta causa belli* from a thoroughly moral-theological standpoint with, at least at first glance, an entirely unpolitical objectivity and neutrality. For this reason, it is not sufficient merely to observe that he was a church theologian and not a state jurist. The great jurist must not be located in the empty space of a neutral objectivity in the modern sense. The Spanish Dominican must also be seen in his historical situation and in the totality of his existence — in his thoroughly concrete thinking as an agent of the Roman Catholic Church, i. e., as an agent of the concrete authority of international law from which the Crown of Castile received its missionary mandate for the New World and thus legal title for the great land appropriation. The arguments in favor of a just war, which appear so general and neutral, obtain their decisive legal force precisely from the missionary mandate; their abstract generality does not diminish the existential reality of a concrete historical standpoint.

The *papal missionary mandate* was the legal foundation of the *conquista*. This was not only the pope's position, but also that of the Catholic rulers of Spain, who recognized the missionary mandate as legally binding. Above all, they emphasized the duty of the mission in their many instructions and orders to their admiral, Christopher Columbus, and to their governors and officers. This duty was given particular emphasis in the often-asserted stipulation in Queen Isabella's will of 1501. In the bull *Piae devotionis* of December 1501, the pope transferred Church tithes to the Catholic rulers and in return imposed upon them the maintenance of priests and churches. In a 1510 bull with the same title, he determined they did not have to pay tithes from the gold and silver of the Indians. In a bull of August 1508, he established the patronage of the Spanish rulers over the churches in America.

All these arrangements, mentioned here only as examples, must be judged in terms of the *ius gentium* of the *respublica Christiana* of the Christian Middle Ages — not in terms of present-day international or interstate law, which sharply distinguishes between an internal *domaine exclusif* and an external international law. The structure of the relation between the Crown of Castile and the Roman Church would be inconceivable in principle because the completely secularized international law now in force is based on the territorial sovereignty of states, each of which might conclude its own concordat [with the Vatican], none of which recognizes any spiritual authority with regard to international law, and all of which treat religious questions as purely internal state matters. These sovereign states

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divided the firm land among themselves and left the open sea free — free of the state, not open to occupation. In other respects, discovery and occupation were for them the only legal title for land appropriation. Vitoria explicitly rejects discovery and occupation as a legal title for land appropriation because for him the territory of America was neither free nor unclaimed.

Thus the papal missionary mandate, even if only indirectly, i. e., by way of a just war, is the true legal title to the *conquista*. To this extent, however, Vitoria's arguments are completely consistent with the spatial order of the international law of the *respublica Christiana*. Throughout the Christian Middle Ages, the distinction between the territory of Christian and non-Christian princes and peoples remained fundamental to and characteristic of that spatial order. For this reason, war between Christian princes, understood as limited by *ius gentium*, was something completely different from war between Christians and non-Christians. The pope could issue mandates for either missions or crusades to the lands of non-Christian princes and peoples, which established both the justice of war in international law and the legitimacy of territorial acquisition. Thus, as early as the 10th century, in the Ottonian era, the German emperors received missionary mandates to convert the heathen Slavic peoples and to expand their territory in the East. The pope's proclamation of a crusade against the infidels became a title of great political significance in international law because it constituted the basis for the acquisition of the territory of the Islamic Empire. In its first stage — the stage on which Vitoria's arguments are based — the Crown of Castile's appropriation of American soil was still completely in line with the international law of the Christian Middle Ages based on this spatial order. In fact, it was at once its apogee and its climax.

The Dominican order to which Vitoria belonged and the other orders engaged in converting the Indians were guardians and executors of the missionary mandate out of which the *iure gentium* of legitimate title for a secular *conquista* could develop. These orders were then the agencies of the pope and of the Church as the authority in the *international law* of the *respublica Christiana*. They took very seriously their spiritual task with respect to the secular authorities and officials of the Spanish government. Thus there were constant tensions and disagreements between the Spanish government's colonial officials and all the missionary orders — Dominican, Franciscan, Augustinian, Hieronymite and Jesuit. These disputes, however, should not be understood in terms of modern struggles between church and state. They were no Bismarckian *Kulturkampf* and no

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manifestation of laicism in the sense of the French church controversy. Rather, what was true of the medieval antithesis of emperor and pope was true also here: emperor and pope, empire and church constituted an inseparable unity; disputes between them were neither conflicts between two different political entities nor two different "*societates*," but tensions and disagreements between two orders of one and the same unity, between two *diversi ordines*. In this respect, the Spanish *conquista* was an extension of the concepts of the spatial order of the *respublica Christiana* of the Middle Ages. This medieval *ius gentium*, with all its specific concepts of international law, above all those of a just war and of legitimate territorial acquisition, was only overcome by the self-contained, sovereign, territorial state of the *ius publicum Europaeum*.

It is well-known that the Dominicans deserve special credit for their role in the Christianization of the Indians of the Americas. One need only mention Las Casas, who first in 1530 came to Spain as a Dominican to protect the Indians of Peru from the cruelties of their conquerors. Moreover, the Dominican order was qualified, as the agency of the scholastic tradition of St. Thomas Aquinas, to consider and to formulate the controversial questions which arose from the new situation — the land appropriation of the New World — within the systematic structure and with the methods of scholastic theology and philosophy. The concrete historical fact of the land occupation of a new world thus occasioned Vitoria's intellectual construction in his *relectiones*, with its balancing of pros and cons, arguments and counter-arguments, its distinctions and conclusions, altogether constituting an intellectual unity, an indivisible totality concerned not with the concrete situation and its practical consequences but only with the validity of arguments.

Vitoria's Legacy It is necessary to reiterate that Vitoria did not present the Spanish conquest of the Americas as "unjust." But there is no need here to discuss in detail all the "legitimate legal titles" he explicates, only to restate that his conclusions ultimately justified the *conquista*. His lack of presuppositions, his objectivity and neutrality, have their limits and do not go so far as to disregard the distinction between Christians and nonbelievers. On the contrary, the practical conclusion is completely consistent with Vitoria's Christian convictions, which found their true justification in the Christian missions. It never occurred to the Spanish monk that nonbelievers could demand the same rights of propaganda and intervention for their idolatry and religious fallacies as Spanish Christians for their Christian

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missions. This is the limit of the absolute neutrality of Vitoria's arguments as well as of the general reciprocity and reversibility of his concepts.

Vitoria may be an Erasmian,[40] but he is no advocate of the absolute humanity fashionable in the 18th and 19th centuries; he is no follower of Voltaire or Rousseau, no freethinker or socialist. For Vitoria, the *liberum commercium* does not mean the liberal principle of free world trade in the sense of the "open door" of the 20th century; it is nothing more than an expedient of the pre-technical age. The freedom of missions, however, is truly a freedom — a *libertas* of the Christian Church. In the thinking and terminology of the Middle Ages, *libertas* was synonymous with law. Thus, for Vitoria, Christian Europe was still the center of the earth — both historically and concretely oriented to Jerusalem and Rome.

Vitoria was in no sense one of "the forerunners of modern lawyers dealing with constitutional questions,"[41] as an especially critical 19th century Hegelian called those scholars who assumed a purely formal pro and con standpoint of inner neutrality with respect to questions of the existence of Christianity. Abstracted entirely from spatial viewpoints, Vitoria's ahistorical method generalizes many European historical concepts specific to the *ius gentium* of the Middle Ages (such as *Volk*, prince, and war) and thereby strips them of their historical particularity. This allowed theology to become a moral doctrine and, in turn (with the aid of an equally generalizing *ius gentium*), a "natural" moral doctrine in the

40. According to the references provided by Bataillon (*Erasme et l'Espagne*, *op. cit.*, pp. 260ff.), Vitoria cannot be called an Erasmian, nor can he be called an anti-Erasmian. At the Valladolid Conference of 1527, Vitoria emphasized many of Erasmus' dogmatic errors (*ibid.*, pp. 273f.); but here it is more a question of his general attitude toward Erasmus, in particular with respect to war. As is well-known, Pelayo regarded Vitoria as an Erasmian, while Getino refuted this claim. See Luis G. Alonso Gitino, *Vida el Maestro Fr. Francisci de Vitoria y el renacimiento filosofico teologico del siglo XVI* (Madrid: tip. de la "Rev. de arch., bibl. y museos," 1914). The core of the matter is not in biographical or theoretical details but in what might be called the *historico-intellectual slant* of Vitoria's arguments and their tendency to be neutral. After completing this chapter, I became acquainted with an important lecture by Alvaro d'Ors which rightly emphasizes the "neutral tendency" inherent in Vitoria's arguments: "*Vitoria liquida el orden de ideas que prevalecia en la Edad Media; liquida, en el campo del Derecho de gentes, la concepción teológica, para dar paso a una concepción racionalista.*" See Alvaro d'Ors, "Francisco de Vitoria, Intellectual," in *Revista de la Universidad de Oviedo* (1947), p. 12.

41. "Those legal scholars who assumed the role of arbiters in the medieval dispute between secular and spiritual power, and regarded the question of the existence of Christianity in antiquity as one of form which could be decided arbitrarily and without prejudice in terms of its pros and cons, were already forerunners of modern lawyers who, for instance, also believed they were upholding the life of the state."

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modern sense — merely a rational law. Following in the foosteps of Vitoria and Suarez,[42] 17th and 18th century philosophers and jurists from Grotius to Christian Wolff consistently developed this moral doctrine of late scholasticism into a still more general, more neutral and purely human *ius naturale et gentium.*

These philosophers and jurists discarded the distinction, essential for Spanish Dominicans, between Christian believers and nonbelievers. It thus became possible to use Vitoria's arguments for other and even antithetical political goals and intentions. On the basis of the purest motives of moral-theological objectivity, Vitoria rejected any discrimination on the basis of Christian and non-Christian, civilized and barbarian, European and non-European. But this is precisely what doomed his theses and definitions to be misused and paved the way for completely heterogeneous aims strong enough to overpower scholastic concepts and formulas. Abstractly conceived, particular principles and ideas can be divorced from the concrete unity of a complex intellectual structure and from the concrete historical situation, making it both possible and easy to apply them generally to entirely different situations. An especially widespread and improper use of Vitoria's thinking is the transposition of his moral-theological doctrines into a context centuries later where no longer theologians of the Roman Church but rather jurists of neutral (with respect to religion) powers developed arguments in international law. In this essentially different intellectual milieu of untheological — purely moral and or purely juridical — expositions, his thinking is misconstrued.

In itself, this is not unusual; it has occurred frequently in history. For example, the British historian John Neville Figgis has established that disputes between governments and parliaments over modern parliamentarism during the 19th century were no different than those between the pope and the synod in the 15th century. By the same token, similar arguments and viewpoints were reiterated in conflicts between pope and emperor, spiritual authority and secular power. Thus many of Vitoria's arguments could be divorced from the concrete historical problem — justification of the European land appropriation of a non-European new world by papal missionary mandate — and applied to other situations. Few authors have had their arguments transplanted in such a way, and few names have become so famous as a result. In this

42. [Tr.] Francisco Suarez (1548-1617) was a Spanish theologian and philosopher.

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respect, Vitoria's reputation has its own history and requires special treatment. The almost mythical renown Vitoria's name has acquired in certain quarters over the last few decades is an interesting historical phenomenon in itself. It is instructive for international law scholarship, which is why it is necessary to be historically specific — at least to the extent of offering two or three examples of how his thinking has been used.

Here I do not have in mind primarily true jurists, such as Gentili, who refers frequently to Vitoria without appropriating his arguments in any systematic way. In contradistinction to the theologians, Gentili is too much the secular jurist. Grotius is a different matter. He also distinguished himself from theologians, but he was inclined to use their arguments. Of particular note is his well-known treatise, *Mare liberum*,[43] in which he adopts Vitoria's arguments on *liberum commercium* and the freedom of missions. That same *freedom* Vitoria sanctioned for Spanish Catholics *vis-à-vis* the heathen Indians Grotius advances for Dutch and English Protestants *vis-à-vis* Portuguese and Spanish Catholics. Thus a train of thought which a Spanish theologian expounded as an altogether internal, Spanish-Catholic matter within the firm framework of the Dominican order and within the political unity of the Spanish-Catholic empire was employed against Spain only a few decades later by a polemical jurist of a hostile country in the propaganda against Spain during the European trade wars. Grotius even claims he is bringing the question of free trade before the tribunal of conscience and is appealing to those very Spanish jurists versed in divine as well as human law.

The extent to which Grotius appropriated the arguments of earlier authors is generally known. Not always recognized is that in a different time these arguments meant something completely different. The distribution of the earth had then reached a different stage. This Protestant instrumentalization neutralized the specifically Catholic character of Vitoria's intentions. Having become mercantilist, European states no longer accepted the arguments of *liberum commercium*. Molina already had concluded that every state had the right to expel unwelcome friends, and

43. Hugo Grotius, *Mare liberum: sive de iure quod Batavis competit ad Indicana commercia dissertatio* (1607). [Tr. Schmitt refers here to the edition published in Washington, DC by the Carnegie Endowment for International Peace, 1916). Cf. Hugo Grotius, *The Freedom of the Seas: or, The Right which Belongs to the Dutch to Take Part in the East Indian Trade* (New York: Oxford University Press, 1916)].

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Pufendorf already had become openly mercantilist.[44] This transformation was crucial for the history of modern international law and for the problem of a just war. It has long been recognized by historians, and it should be readily apparent here with respect to the various uses of Vitoria's arguments and the transformation of his intentions.

Almost 300 years later, the Spanish Dominican's arguments were inserted in an even more astonishing manner into a system of thought completely foreign to him. After WWI, a "renaissance" of Vitoria and late Spanish scholasticism marked an especially interesting phenomenon in the history of international law. The great Spanish theologians had not been forgotten completely, especially in Spanish and Catholic traditions. The astonishing degree to which Suarez dominated German and Protestant universities during the 17th century was never completely forgotten, even if it was Eschweiler who again called attention to it.[45] In the history of international law, Spanish theologians were known to all good 19th century authors, such as [Baron Karl von Stacheu] Kaltenborn and [Alphonse] Rivier, as "forerunners of Grotius."[46] But only after 1919 did Vitoria's name suddenly become known and famous throughout the world.[47]

Following James Lorimer,[48] a major 19th century Belgian jurist, Ernest Nys, frequently refered to Vitoria in his legal-historical studies of international law in the Middle Ages and the 16th century.[49] It was

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44. The Strasbourg theses of Johannes Paulus Silberrad, advocated in 1689 under the presidency of Johannes Joachim Zentgrav, are particularly instructive for the late 17th century. The line of argument for a just war is retained, but (with reference to Pufendorf) non-Christian princes also are conceded the right to exclude unwelcome visitors from their lands. See Johannes Paulus Silberrad, *De Europaeorum ad Indorum regiones iure*, p. 15.

45. Eschweiler, *Die Philosophie der Spätscholastik*, *op. cit.*

46. Joseph-Barthélemy, *Le fondateurs de droit international . . . leurs oeuvres, leurs doctrines*, Edited with an introduction by A. Pillet (Paris: 1904).

47. There is no need here to discuss the misinterpretations which made a journalistic myth of the great Dominican. These have been refuted by Marcos in *Vitoria y Carlos V*, *op. cit.*

48. In his *Institutes of International Law* (1883/84), translated into French by Nys, Lorimer named Vitoria, Soto and Suarez as the founders of international law.

49. Nys refers to Vitoria in many important works, beginning with "Les publicistes Espagnols du XVIe siècle et les droits des Indiens," in *Revue de Droit international et de Législation comparée*, Vol. XXI (1889), pp. 532-560 and concluding with an edition of Vitoria's *Relectiones*, *op. cit.* Cf. also by Nys, *The Papacy considered in Relation to International Law*, translated by Rev. Ponsonby (London: H. Sweet, 1879): *Le droit de la guerre et les précurseurs de Grotius* (Brussels: C. Muquardt, 1882); *Les droits des Indiens et les publicistes espagnols* (Brussels: P. Weissenbruch, 1890); *Les initiateurs du droit public moderne* (Brussels: P. Weissenbruch,1890); *Les origines du droit international* (Brussels: A. Castaigne, 1894).

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Nys who broke the ground and paved the way for the Vitoria renaissance after WWI, which has already resulted in a large bibliography.[50] The thrust of his work was a function of his faith in humanitarian civilization and progress. There is no need to belabor this point, since Nys himself quite openly avowed his beliefs not only in occasional remarks and formal addresses but also in an important scholarly treatise on the modern history of international law.[51] Like all the works of the great scholar, this treatise is extraordinarily rich and is a crucial document with respect to "*le crime de l'attaque*," the criminalization of aggressive war.

The most recent and modern chapter in the history of the use of Vitoria's arguments is directly related to Nys' works. James Brown Scott, the world-renowned American jurist, founder and president of the American Institute of International Law and the American Society for International Law, Secretary of the Carnegie Endowment for International Peace and

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50. Camilo Barcia Trelles' lectures constituted the strongest breakthrough for the world at large. See Trelles, "Francisco de Vitoria et l'école moderne du droit international," in *Recueil des Cours*, Vol. 17 (1927), No. 2, pp. 113-337. As early as 1925, in a lecture in Salamanca, Trelles hailed Vitoria as a precursor of the Monroe Doctrine (America for the Americans). Alejandro Alvarez called the Monroe Doctrine the "true gospel of the new continent" in *Le droit international américain: son fondement sa nature: d'après l'histoire diplomatique des états du nouveau monde et leur vie politique et économique* (Paris: A. Pedron, 1910). Of course, this modern gospel is not identical with the one Vitoria espoused. In 1928, in the same city (Valladolid) in which Trelles' book on Vitoria as the founder of modern international law appeared (*Francisco de Vitoria et l'école moderne du droit international du XVI siècle* [Paris: Hachette, 1928]), Scott delivered a lecture on the Spanish origins of modern international law. Fernandez Prida Joaquin has published a book on the influence of Spanish writers on modern international law (*Influencia de los tratadistas espanoles en la formación de la ciencia del derecho international publico* [Madrid: Imp. Artistica Saez Hermanos, 1929]). For further information, see Rodrigo Octavio, "Les sauvages Américains devant le droit," in *Recueil des Cours*, Vol. 31, No. 1 (1930), pp. 218ff. An association founded at the university in Utrecht proclaimed Vitoria the leading authority on colonization. See Gesina H. J. van den Molen, *Alberico Gentili and the Development of International Law. His Life, Work and Times* (1937), p. 270, n. 14 [Second Revised Edition (Leyden: A. W. Sijthoff, 1988)]; see also A. H. Böhm, *Het recht van kolonisatie, Francisco de Vitoria's lesson over het recht tot koloniseeren in verband met de Spaansche kolonisatie het optreden der Pausen en het internationale recht* (Utrecht: A. Oosthoek, 1936) and *Les leçons de Francisco de Vitoria sur les problèmes de la colonisation et de la guerre*, ed. and tr. by Jean Baumel (Montpellier: Imprimerie de la Presse, 1936). These references are sufficient here. For more information, see Fr. A. Frh. von der Heydte, "Franciscus de Vitoria und sein Völkerrecht: Zum 400. Geburtstag der Völkerrechtswissenschaft," in *Zeitschrift für öffentliches Recht*, Vol. 13, No. 2 (1933), pp. 239-268. See also Lászlo von Gajzago on the Spanish origin of international law (*A háború és bëke joga* [Budapest: Stephaneum Nyomda, 1942]); and Höffner, *Christentum und Menschenwürde*, *op. cit.*

51. See Ernest Nys, *Idées moderne, Droit international et Franc-Maçonnerie* (Brussels: M. Weissenbruch, 1908).

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Director of the International Law Division, who died in 1943, endeavored to make himself the official exponent of Vitoria's fame and dedicated himself to this task. Andrew Carnegie, in his December 14, 1910 letter establishing the Endowment, characterized war as essentially criminal, though without distinguishing between aggressive and defensive wars, and of course without citing any theologians. For Scott, however, Spanish theologians were a great resource. He delivered numerous lectures on Vitoria and Suarez as the founders of modern international law and espoused his thesis in various publications.[52]

The Proper Place of Vitoria's Thinking Scott's zeal succeeded in making Vitoria's name well-known and even popular in circles far beyond the scholarly disciplines of history and international law. His efforts also marked a new stage in the instrumentalization of Vitoria's arguments that by now has reached the point of political myth-making. Even in official and semi-official US government declarations there is a "return to older and sounder concepts of war," by which is meant above all Vitoria's doctrines on free trade (*liberum commercium*), the freedom of propaganda and a just war. War should cease to be simply a legally recognized matter or only a matter of legal indifference; it should again become a *just* war in which the aggressor as such is declared a felon in the full criminal sense of the word. The former right to neutrality, grounded in the international law of the *ius publicum Europaeum* and based on the equivalence of just and unjust war, should also and accordingly be eliminated.

Here we need not elaborate on the general antithesis between medieval Christian and modern civilized beliefs. In the Middle Ages, a just war could be a *just war of aggression*. Clearly, the formal structure of the two concepts

52. [Tr. Cf. *Vitoria et Suarez: Contribution des theologiens au droit international moderne*, with a preface by James Brown Scott (Paris: A. Pedone,1939)]. James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations*, introduction to an edition of Vitoria's writings (Oxford: Clarendon Press, 1932). See the reviews of James Brown Scott, *The Catholic Conception of International Law* (Wash. DC: Georgetown University Press, 1934), by William Renwick Riddell and John T. Vance in *Georgetown Law Review*, Vol. XXIII, (1935), pp. 904-908 and 908-915 respectively. Scott's book also was published under the title *The Spanish Conception of International Law and of Sanction* (New York: Carnegie Endowment for International Peace, Division of International Law, 1934). Further bibliography can be found in Heydte, "Francisco de Vitoria und sein Völkerrecht," *Zeitschrift für öffentliches Recht*, *op.cit.*; Gajzago, *Der Ursprung des Völkerrechts aus der spanischen Schule*, *op. cit.*; and Höffner, *Christentum und Menschenwürde*, *op.cit.*

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of justice are completely different. As far as the substance of medieval justice is concerned, however, it should be remembered that Vitoria's doctrine of a just war is argued on the basis of a missionary mandate issued by a *potestas spiritualis* that was not only institutionally stable but intellectually self-evident. The right of *liberum commercium* and the *ius peregrinandi* are to facilitate the work of Christian missions and the execution of the papal missionary mandate. They are not the same as the principle of the open door for industrial penetration, nor should a relativistic or agnostic renunciation of the truth be confused with the call for free propaganda supported by Matthew 28:19.[53] Here we are interested only in the justification of land appropriation — a question Vitoria reduced to the general problem of a just war. All significant questions of an order based on international law ultimately join in the concept of a just war. Consequently, also here the heterogeneity of intentions reaches its highest degree of intensity.

Despite many internal anomalies, the medieval doctrine of a just war was at least grounded in the framework of a *respublica Christiana*. On the one hand, it distinguished various types of feuds and wars; on the other, it recognized the legal validity of the feudal right of challenge and the estate-based right of resistance. It had to distinguish between feuds, wars between Christian belligerents (those subject to the Church's authority), and other wars. Crusades and missionary wars authorized by the Church were *eo ipso* just wars, without any distinction between aggression or defense. Princes and peoples who obstinately evaded the Church's authority, such as Jews and Saracens, were by definition *hostes perpetui*. All this presupposed the authority of a *potestas spiritualis* in international law. The doctrines of the Christian Middle Ages could never be abstracted from this authority of the Church in international law, least of all when one of the belligerents was a Christian prince.

Formally speaking, the authority of the Church was decisive in the determination of a just war. Accordingly, from the standpoint of substantive law, a just war was one waged *ex iusta causa*, i. e., for the purpose of pursuing legal demands, regardless of whether the war was aggressive or defensive either strategically or tactically. The fact that *iusta causa* sets the standard precludes the purely juridical protection of property (upon which, for example, the 1924 Geneva Protocol is based) from being the only factor to decide the justice or injustice of a war. Definitions of the aggressor, such as those underlying the 1924 Geneva Protocol or the

53. [Tr. "Go ye therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost"].

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1932/34 Disarmament Conference, are meant precisely to prevent any reference to the causes of a war or to the actual justice or injustice of such causes in order to avoid the interminable and futile discussion of questions of guilt in matters of foreign policy.

Based on relations between states, post-medieval European international law from the 16th to the 20th century sought to repress the *iusta causa*. The formal reference point for the determination of a just war was no longer the authority of the Church in international law but rather the *equal sovereignty of states*. Instead of *iusta causa*, the order of international law between states was based on *iustus hostis*. Any war between states, between equal sovereigns, was legitimate. On the basis of this juridical formalization, a rationalization and humanization — a bracketing — of war was achieved for 200 years. It is sufficient (but obviously also necessary for the restoration of a true image of Vitoria) to note that the turn to the modern age in the history of international law was accomplished by a *dual division* of two lines of thought that were inseparable in the Middle Ages — the definitive separation of moral-theological from juridical-political arguments and the equally important separation of the question of *iusta causa*, grounded in moral arguments and natural law, from the typically juridical-formal question of *iustus hostis*, distinguished from the criminal, i. e., from becoming the object of punitive action.

The decisive step from medieval to modern international law — from the theological system of thought predicated on the Church to a juridical system of thought predicated on the state — lies in these two points. Such a step concerns not only theoretical questions of concept formation; it exemplifies much more the profound antithesis between two concrete orders and authorities fundamentally distinct both institutionally and organizationally. Sociologically, it is the structural antithesis of two leading elites — politically active groups and their advisors — as well as of the methods and means by which their respective political convictions and opinions are formed. A true jurist of this transitional period, Gentili, formulated the battle cry and coined what may be considered the slogan of the epoch in terms of the sociology of knowledge: *Silete theologi in munere alieno!*

Despite all his neutrality, objectivity and humanity in other respects, in these two points — the relation between theological and juridical thinking as well as the question of *iusta causa* — Vitoria's thinking belongs to the international law of the Christian Middle Ages rather than to the modern international law between European states. As already noted, Vitoria chose to remain a theologian and never became a jurist. He is a theologian

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not only because he designates Jews and Saracens as *hostes perpetui* or because, in his *relectiones*, *de potestate civile*, he insists a war undertaken to harm Christianity is *eo ipso* unjust, but primarily because he does not advance from the problem of *iusta causa* to a fundamental discussion of the question of *iustus hostis*. Although he appears to move in this direction, what matters to him is that the Indians, though they are not Christians and may be guilty of many crimes, should not be treated as criminals but as opponents in war, that Christian Europeans should deal with them in the same way as with Christian-European enemies. Vitoria was thus able to justify the Spanish *conquista* from the general argument of the right to war without discriminating against barbarians or non-Christians as such. In so doing, he approached the non-discriminatory concept of war characteristic of the new international law between states. But he did not expand this position juridically into a new doctrine of *iustus hostis*, as did Gentili, for example, but rather substantiated this non-discrimination only with general references to the question of *bellum iustum* in the Christian moral theology of the Middle Ages.

By contrast, the present theory of a just war aims precisely to discriminate against the opponent who wages an unjust war. War becomes an "offense" in the criminal sense and the aggressor a "felon" in the most extreme criminal sense: an outlaw, a pirate. Yet the injustice of the aggression and the aggressor lies not in any substantive or material establishment of guilt in war, in the sense of determining the cause of war, but rather in the *crime de l'attaque*, in *aggression as such*. Whoever fires the first shot or engages in any equivalent action is the "felon" in this new criminal offense. The problem of *iusta causa* remains outside the definition of terms. For this reason alone, the modern distinction between a just and an unjust war lacks any inherent relation to the medieval scholastic doctrine and to Vitoria. Both recognize the validity of a just war of aggression, a *bellum iustum offensivum*, although Vitoria was aware of the thoroughly questionable nature of the doctrine. One need only consider the five *dubia circa iustum bellum* or the nine *dubia* "*Quantum liceat in bello iusto*" in his *Relection de iure belli* to understand that the great advance of modern international law between European states consisted in substituting the doctrine of juridical equality of *iusti hostes* for the doctrine of *iusta causa*.

Should this doctrine simply be abandoned today? After all, it is not so easy to return to a pre-state doctrine after several hundred years of rationalization in thinking about relations between states. It is still more difficult to transfer juridical concepts from a system based on an *ordo*

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spiritualis to a system completely lacking any such order. If today some formulas of the doctrine of a just war rooted in the institutional order of the medieval *respublica Christiana* are utilized in modern and global formulas, this does not signify a return to, but rather a fundamental transformation of concepts of enemy, war, concrete order and justice presupposed in medieval doctrine. For scholastic theologians, even an unjust war was still war. The fact that one of the belligerents was pursuing a just war and the other an unjust war did not itself negate the concept of war in medieval doctrine. However, if the justness of a war could be determined according to *iusta causa*, there was always a latent tendency to discriminate against the unjust opponent and thus to eliminate war as a legal institution. War then quickly became a mere punitive action; it acquired a punitive character. The many serious *dubia* of the doctrine of *bellum iustum* were quickly forgotten. The enemy became a criminal, and the rest — the deprivation of rights and the plundering of the opponent, i.e., the destruction of the concept of the enemy (still formally presupposing a *iustus hostis*) — then followed as a matter of course.

Vitoria says: "*Princeps qui habet bellum iustum fit iudex hostium . . . .*" In Cajetan[54] one can already read: "*Habens bellum iustum gerit personam iudicis criminaliter procedentin.*" But if the "punitive" character of a just war is so described, this should not be understood in terms of modern concepts of criminal justice, even less in terms of criminal police actions, but only and possibly in the sense of a modern penal code, which is by now nothing more than social pest control. In other words, the doctrine of a just war in the sense of *iusta causa belli* had at that time not yet gone so far as to eliminate the concept of war altogether, thereby transforming a belligerent action into a purely judicial or police action in the modern sense. This was not yet possible, if only because, in the age of the feudal right of challenge and the estate-based right of resistance, a central state judiciary and police in the modern sense did not yet exist. The right of self-defense and the right of resistance were valid in the medieval legal order. The judiciary and the police in the modern state eliminated precisely this type of self-defense and transformed it into criminal offenses such as high treason, sedition, disturbance of the peace, and other transgressions.

54. [Tr. Cardinal Cajetan (1470-1534), also called Gaetanus, from his birthplace in Gaeta (Naples). A Dominican like Vitoria, Cajetan acquired his reputation as a theologian in a public disputation with Pico della Mirandola at Ferrara (1494). Being as adept at diplomacy as theology, he was employed by the pope in several negotiations and transactions. He is best known for his appearance at the Augsburg diet, where in 1519 he helped draw up the bull of excommunication against Luther.

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As soon as the institutional foundations of the medieval doctrine of a just war were disregarded, the dissolution of the concept of war was close at hand. A Lutheran contemporary of Vitoria, the jurist Johann Oldendorp (1480-1567), plainly stated that a just war is nothing but justice and an unjust war nothing but rebellion. In so doing, he had no idea that this abolition of war in effect created a new and difficult problem for Europe — religious civil war. By comparison, faced with the problem of these European civil wars, the juridical founders of modern international law between states — Ayala, Gentili and Zouche — divorced the question of *bellum iustum* proper from the problem of *iusta causa belli* and made war into a mutual relation between sovereign states in which *iusti et aequales hostes* confronted each other indiscriminately.

In Vitoria's thinking, as in medieval doctrine, war remains war on both sides despite its "punitive character." Vitoria does not even deny the character of a real war to a just war waged by Christian princes *against non-Christian* princes and peoples, and he accordingly regards the opponent in such a war as a *iustus hostis*. In the modern, discriminatory concept of war, the distinction between the justice and injustice of war makes the enemy a felon, who is no longer treated as a *iustus hostis* but as a criminal. War is then no longer a matter of international law, even if the killing, plundering and annihilation continue and intensify with new means of destruction.

Since on one side war becomes a punitive action in the sense of modern criminal law, on the other the opponent can no longer be a *iustus hostis*. It is no longer war waged against him, any more than against a pirate, who is an enemy in a sense completely different than in European international law. He has committed an offense in the criminal sense — the crime of aggression, "*le crime de l'attaque*." The action taken against him is thus no more war than a police action against a gangster. It is merely the execution of justice and ultimately, with the modern transformation of penal law into social pest control, only a measure taken against a parasite or troublemaker — against a *perturbateur*, who is disarmed with all the means of modern technology, e.g., one rendered harmless by a police bombing. War is abolished, but only because enemies no longer recognize each other as equals morally and juridically. This may be a return to an older standpoint. In many respects, however, it is also a retreat from a juridical concept of *iustus hostis* to a quasi-theological concept of the enemy. In this respect, it is the antithesis of a non-discriminatory reciprocity taken to its extreme, which with Vitoria is so clearly expressed in a Christian sense.

The history of how Vitoria's arguments have been used in international

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law from the 16th century until now offers striking examples of unexpected transformations and reinterpretations. But no thought is safe from reinterpretations, and any argument is subject to a fate which often can be more surprising than is suggested by the well-known expression "*fata libellorum*." In Vitoria's case, we have a member of an order who remained true to his principles and who, as a moral theologian and a prudent teacher, conscientiously considered the pros and cons of his arguments. He presented his thoughts before his co-religionists and accommodated his conclusions to the indivisible unity of his propositions and distinctions.

From the intellectual unity of a controversy at once internal to the Church and to Spain, other authors, non-ecclesiastical and anti-Spanish alike, extracted arguments and formulas that served their purposes as juridical trump cards. The power of such a scholastically thorough and open a thinker as Vitoria was thus harnessed to a cause not only foreign but even hostile to his intentions. The melody conceived for a pious Christian text was thus set to an entirely different and worldly libretto. This too belongs to the heterogeneity of intentions so often at work in the history of the human spirit.

All this is not surprising, and our intention here is not to polemicize against it. Yet it should be remembered in a scholarly consideration of the facts. With respect to Vitoria's remarkable *relectiones*, we have not pointed to such tragic possibilities of heterogeneous uses to detract from the stature of his work or to diminish the honor of his name. On the contrary, our only intention has been to strip his image of added layers of false veneer and to restore to his words their true meaning. His reputation loses nothing in the process. The less shrill the resonance, the truer the sound.

Legal Title to the Land Appropriation of a New World

The new European international law began with Gentili's entreaty that theologians remain silent with respect to the question of a just war: *Silete theologi in munere alieno*!

The New Territorial Order of the State One of the results of the Reformation was that theologians were barred from dealing with international law. This meant the disappearance of the *potestas spiritualis* that had obtained in the Middle Ages. Medieval theologians argued neither from nor in a vacuum. They all belonged to an institutional order; their words can only be understood concretely within that order. Beginning in the 16th century, however, jurists (now in the service of government) carried

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questions of international law further: in part theoretically, by secularizing the scholastics' moral-theological arguments into a "natural" philosophy and a "natural" law of general human reason; in part practically and positively, by using concepts of Roman law, as required by the civil jurisprudence and legal practice of their time. This resulted in a hybrid of moral-theological doctrines of a just war and purely secular juridical-civil concepts such as "*occupatio*," which were applied to the struggle for the land appropriation of the New World. However, the concrete ordering and bracketing of war in international law in general was not only the result of the extension of moral-theological doctrines and the deployment of Roman legal concepts and norms, but in particular the concrete spatial order of the state developing in Europe at that time and the equilibrium established between these states.

Since the 16th century, European international law — the *ius publicum Europaeum* — was originally and essentially a law between *states*, between European sovereigns. The *nomos* of the rest of the earth was determined by this European core. "Statehood" is thus not a universal concept, valid for all times and all peoples. Both in time and space it marks a concrete historical fact. The altogether incomparable, singular historical particularity of this phenomenon called "state" lies in the fact that this political entity was the vehicle of secularization. The conceptual elaboration of international law in this epoch had only one axis — the sovereign territorial state. It eliminated the holy empire and the imperial house of the Middle Ages. It also eliminated the pope's *potestas spiritualis* and sought to instrumentalize Christian churches for its own political ends. The Roman Catholic Church assumed a lesser position as a mere "*potestas indirecta*" and, as near as I can determine, no longer spoke of an *auctoritas directa*. Other historical and meaningful institutions in the medieval *respublica Christiana*, such as the "crowned heads," also lost their place as well as their typical character and became instrumentalized by the developing state. The king, i. e., the sacred bearer of a crown, became a sovereign head of state.

Here France is the leading power. It was the first state to become sovereign in terms of its juridical consciousness. Already toward the end of the 16th century, the concept of the sovereignty of the king (as the sovereign head of state) overcame for the first time the civil war between religions. In Spain and Italy, the belligerents never came to open civil war. In Germany and England, they openly engaged in war or civil war only in the 17th century. French legists, most prominently Jean Bodin, were the first

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to formulate clear definitions, which spread like wildfire throughout the whole of Europe. In Bodin's *Six Books of the Commonwealth*, the word *respublica* must already be translated as state. Bodin's work had a greater and more immediate impact than any other book by a jurist in the history of law. It appeared in 1576, four years after the St. Bartholomew's Eve massacre in Paris (August 24, 1572) and, like the state it defined, it was a product of the religious civil wars. Therein lies the existential truth and the European validity of this remarkable book.

Ayala's and Gentili's treatises appeared only a few years later (in 1582 and 1588 respectively), and outlined the new international law between states. Both were directly influenced by Bodin. Here it is necessary to consider the all-embracing concept of the sovereign "state" in its concrete particularity in terms of the history of international law. It was this political entity that upset the axis of the spatial order of the *respublica Christiana* of the Middle Ages and replaced it with a spatial order of a completely different type.

Vitoria had no doubt that the legal title for the great land appropriation [of the New World] could be conferred neither by the emperor nor the pope. This is precisely what Spanish authors such as [Fernando de] Soto [1496?-1542] and Vasquez emphasized in 16th century controversies. Ayala, who cites them, also had no doubts in this regard, although he was on the Spanish-Catholic side. From a scholarly and sociological standpoint, the dethroning of the emperor and the pope meant the detheologization of argumentation. From a practical standpoint, it meant not only discarding the concepts on which the previous spatial order of the *respublica Christiana* rested but eliminating the limitation of war they entailed. At the same time, this meant the end of the medieval doctrine of the tyrant, i. e., the possibility of intervention by the emperor and the pope, as well as the end of the rights of challenge and resistance and the old "peace of God." These were supplanted by a peace guaranteed by the state. Above all, this type of state meant the end of the Crusades, i.e., of papal mandates as recognized legal titles for land appropriations of non-Christian princes and peoples.

All this is only the negative side: only the end of the Middle Ages, not yet the beginning of any new spatial order. In Europe — on the continent — this new order was created by the state. Its historical specificity, its characteristic historical legitimation, consisted in the secularization of European life as a whole. First, it created clear internal jurisdictions by placing feudal, territorial, estate and church rights under the centralized legislation, administration and judiciary of a territorial ruler. Second, it

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put an end to the European civil war of churches and religious parties and thereby neutralized confessional conflicts within the state through a centralized political unity. (In a somewhat crude and primitive, yet clear and appropriate way the German formula *cuius regio, eius religio* expressed this new relation between religious belief and a spatially closed territorial order.[55]) Third, on the basis of the internal political unity it achieved *vis-à-vis* other political unities, the state constituted within and of itself a closed area with fixed borders allowing a specific type of foreign relations with other similarly organized territorial orders.

Thus arose the territorial order of the "state" — spatially self-contained, impermeable, unburdened with the problem of estates, church and religious civil wars. It became the agency of a new order in international law, whose spatial structure was determined by and referred to the state. Its peculiarity lay in that its international law became, in a specific sense, inter-state law: law between states. Only as a consequence of the clear demarcation of self-contained territories did *ius gentium* become distinctly and clearly a *ius inter gentes*, an *inter gentes Europaeas*. Of course, at that time the *gentes* appeared on the stage of European history first as princes, houses, crowns and regions — often still in medieval garb. Nonetheless, the spatial core of the new European order was this new entity called "state."

The distinction between *ius gentium* and *ius inter gentes* is of long-standing. It was well-known to medieval theologians and jurists. As an abstract antithesis, it was not a scientific discovery. It was nothing new for Vitoria. But the transformation of the *gentes* into centralized, self-contained and limited territorial states did give rise to a new spatial structure. The *ius inter gentes* was thereby freed from the supraterritorial ties that had obtained

55. This formula was in keeping with the reality of the European state which arose in the 16th century and whose most important right was everywhere the *ius reformandi*, i. e., the right to determine a state religion and a state church: *religio est regula iurisdictionis*. Perhaps the formula *cuius regio, eius religio* stems from a later stage of the latent or open religious civil war that began with the Reformation. Such sharpening of slogans is usually the result of later historical experiences. Johannes Heckel traced this formula back to the originator of Episcopalianism and the author of the first textbook of Protestant church law (Joachim Stephani, *Institutiones iuris canonici*, Second Edition [Frankfurt, 1612]) in "Cura religionis. Ius in sacro. Ius circa sacra," in *Kirchenrechtliche Abhandlungen: Festschrift Ulrich Stutz zum siebzigsten Geburtstag* (Stuttgart: Verlag von Ferdinand Encke, 1938), p. 234. Nevertheless, Henkel attempts to prove that the principle of the matter does not originate in the Protestant but in the Catholic camp. For our purposes, all posthumous questions of guilt are irrelevant, as they are with respect to the modern formula *cuius regio, eius economia*, which helps understand the core of the contemporary problem of *Großraum*.

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until then, i.e., the ubiquitous ties to the supraterritorial Church, the hotchpotch of feudal ties of a personal sort and, finally, the overlapping of estate and religious partisanship. Of course, it took more than 100 years for the *ius gentium* to rid itself of traditional forms and to become a purely political *ius inter gentes*. Princely "houses," such as the Hapsburg and the Bourbon, i. e., the great dynastic families, aggregated within one power various crowns — the Bohemian, the Hungarian, and others — as well as lands, rights of succession, and other legal titles. They became and remained the true agents of European politics and thus also the subjects of international law into the 18th century. Most European wars were waged for succession and had their *iusta causa* in the divine right of kings. But all this was only preliminary. Philip II of Spain, in his occupation and seizure of Portugal (1580), with sovereign deliberation dispensed with this type of legal title. The purely state structure of international law became clear in the title of one of Zouche's works,[56] where *gentes* means sovereign territorial orders.

The struggle for the land appropriation of the New World and for the land still free and outside Europe now became a struggle between European powers in the specific sense of "states." Whoever lacked the capacity to become a "state" in this sense was left behind. It is impressive to see how the first great land appropriator, Spain, or more precisely, the Crown of Castile and Leon, inaugurated this epoch and was at the forefront of this development away from the Church and the Middle Ages, while simultaneously remaining bound to the Church's legal title which legitimated its great land appropriation.

Occupation and Discovery How did the new jurists of international law answer the great question concerning legal title to the land appropriation of the New World? The crucial point is that they no longer answered it as a question pertaining to Europe as a whole, but only in terms of the struggle between individual European powers vying for land appropriations. Only in this way — in terms of their interest in internal European conflicts over land appropriations of non-European territory — can we explain their use of the Roman legal and civil concept of "*occupatio*" as the essential legal title as well as their complete failure to recognize the true European legal title: discovery.

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56. Richard Zouche, *Iuris et iudicii fecialis, sive, iuris inter gentes, et quaestionum de codem explicatio, qua quae ad pacem e bellum inter diversos principe, aut populos spectant, ex praccipuis historico-iure peritis, exhibentur* (Oxford: 1650) [(Washington, DC: Carnegie Institution, 1911)].

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The legal title of *occupatio* corresponded to the reality of that time, to the extent that it presupposed the distinction in international law between the European territories of European princes and peoples and other territories "overseas." The territory of the New World was open for occupation. With this thesis, 17th and 18th century jurists assumed in practice that the territory of the New World was open for occupation only by European states. Of course, it was understood that the territory of the occupied colonies would not be identical with the state territory of the occupying power. Both in the case of trade and settlement colonies, these territories remained distinct. At that time, occupation was something essentially different from what has been called "effective occupation" since the end of the 19th century, meaning the incorporation of a given territory into the governmental and administrative system of a state recognized as a member of the international community. In other words, this "effective occupation" meant the suspension of the specifically colonial territorial status and its transformation into the territory of the state.

In the 16th, 17th and 18th centuries, this was out of the question. The mere fact that immense spaces were conquered and dominated by autonomous trading companies ruled out such an equalization of European and colonial territory. More colonial territory was acquired in the form of a feudal land grant. It should not be forgotten, however, that the elaboration of *occupatio* as the international juridical title of acquisition had only the practical purpose of making the individual occupying power independent in relation to its European rivals and of obtaining an original juridical title independent of them. To the extent that the juridical discussion focused on the legal title of "*occupatio,*" European legal consciousness had to forget the common European origin of the whole question. As a result, the core problem — the common land appropriation of non-European territory by European powers — was also forgotten.

In reality, the only justification of the great land appropriations of non-European territory by European powers at that time was *discovery*. Once the medieval spatial order of the *respublica Christiana* was destroyed and every theological argument discarded, the only true legal title that remained for a Eurocentric international law was to discover — *reperire*, *invenire*, then *découvrir* — previously unknown (i. e., by Christian sovereigns) seas, islands and territories. Obviously, it is necessary to understand the new concept of discovery, with all its technical designations (such as *descobrimiento*, *découverte*, etc.) in its total historical and intellectual particularity. Also obviously, merely discovering a new land

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previously unknown to the finder would not constitute legal title *iure gentium*. The many islands and countries found and perhaps even briefly occupied by daring pirates and whale hunters over the centuries were not thereby effectively "discovered" in the sense of international law. Nor could any symbolic acts of seizure, such as laying a stone or hoisting a flag, "as such" establish legal title. They became true legal titles within the framework of a recognized order of international law for which such symbols have a legal force. Discovery, then, is not a timeless, universal and normative concept; it is bound to a particular historical, even intellectual-historical situation — the "Age of Discovery."

Vitoria's arguments demonstrate that this specific historical concept had no meaning for scholastic philosophy. It is all the same to Vitoria whether Europeans find Indian territory or Indians find European territory. For him, these are reciprocal and reversible events, and this very reciprocity and reversibility simply suspend for him the meaning of the concept of discovery both historically and in terms of international law because the meaning of the legal title "discovery" lay in the appeal to the historically higher position of the discoverer *vis-à-vis* the discovered. This position differed with respect to American Indians and other non-Christian peoples such as Arabs, Turks and Jews, whether or not they were considered *hostes perpetui*. From the standpoint of the discovered, discovery as such was never legal. Neither Columbus nor any other discoverer appeared with an entry visa issued by the discovered princes. Discoveries were made without the prior permission of the discovered. Thus their legal title lay in a higher legitimacy. Discoveries could only be made by those peoples intellectually and historically advanced enough to apprehend the discovered by superior knowledge and consciousness. To paraphrase one of Bruno Bauer's Hegelian aphorisms: a discoverer is one who knows his prey better than he knows himself and is able to subjugate him by means of this superiority of education and knowledge.

The European discovery of a new world in the 15th and 16th centuries was thus not by chance and not simply one of many successful campaigns of conquest in world history. Neither was it a just war in any normative sense, but rather an achievement of newly-awakened Western rationalism — the product of an intellectual and scientific culture that arose in the European Middle Ages with the necessary assistance of systems of thought which had reconstituted classical European and Arabic knowledge in Christian terms and molded it into a great historical power. Columbus was still influenced by legendary and incorrect notions, but the scientific character of his thinking is unmistakable. The intense scientific

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awareness of the discoveries was documented in cosmographic expositions that spread like wildfire throughout Europe. Thus it is completely false to claim that, just as the Spaniards discovered the Aztecs and the Incas, so the latter could have discovered Europe. The Indians lacked the scientific power of Christian-European rationality. It is a ludicrous anachronism to suggest they could have made cartographical surveys of Europe as accurate as those the Europeans made of America. The intellectual advantage was entirely on the European side, so much so that the New World could simply be "taken." In the non-Christian Old World of Asia and Islamic Africa, it was only possible to establish the regime of capitulations and the extraterritoriality of Europeans.

The common European legal title of discovery should not be confused with the internal European utilization of individual discoveries against European rivals. Most jurists wrote their books only in the interest of European governments against the jurists of other European governments. In the process, they lost the possibility of recognizing a common title of acquisition in international law. To this extent, it was unfortunate that the jurists drove the theologians out of international law. Yet the practice of European international law at that time confirmed the common legal title of discovery. The cartographical archives are of great significance not only for navigation but also for international law argumentation. A scientific cartographical survey was a true legal title to a *terra incognita*. Such a legal title lost its manifest character to the extent that it lost the intellectual presupposition upon which it was based — the distinction between "known" and "unknown" territory. When this stage was reached, it signaled that the historical hour of another and completely different type of legal title had arrived — "effective occupation," which arose along with and as a consequence of 19th century positivism. Historically, it also indicated something completely different than the Roman law formula of effective appropriation. Unfortunately, 16th and 17th century juridical thinking was not equal to the task of understanding the importance of the legal title of discovery. Ultimately, it was even more ahistorical than the scholastic theologians and remained helpless within the formulas of a purely civil property law.

The Juridical Approach to Land Appropriation in the New World What did the jurists of international law do at that time? Outwardly, they retained numerous formulas of medieval scholasticism and jurisprudence, although these had originated in a completely different — pre-global — spatial order

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and presupposed either concepts lacking any spatial sense or a fundamentally different type of *nomos*. They added ostensibly purely juridical — "civil" — concepts from late medieval commentaries as well as a humanistic erudition of an often seriously misunderstood antiquity. They did so not only as scholars in the style of their age, but above all as jurists following the professional and objective necessities of their rank in order to assert their independence *vis-à-vis* the theologians. As state jurists, they had to provide distinct and specifically state-juridical arguments *vis-à-vis* Church theologians. The outcome is easy to imagine. In the internal struggle within Europe, every European government sought to utilize the formulas and concepts of a now dislocated Roman civil law to its own advantage and to the disadvantage of its opponents. Great systems of legal philosophy arose only later, during the Baroque age. At first, the right of war constituted the core of every international law, and in practice diplomatic law was central to the discussion. For the rest, every state sought to create (by means of specific treaties) a positive *ius publicum Europaeum* that would give it a juridical advantage by stabilizing a favorable *status quo*.

However, the most important treaties and agreements, above all those (such as amity lines) establishing a spatial order, were at first secret. They were not even written down, only verbally agreed upon. Obviously, this type of secrecy constituted an insurmountable barrier to any legal positivism, even if it referred to secret treaties or decrees. Within such a context, the moral theologian of the Church was in a privileged position. As a confessor or teacher of confessors, he even had a particular authority in this regard and, as the agent of a *potestas spiritualis*, was actually in his element. By contrast, the state jurist could no longer even get close to the central question — the common land appropriation of non-European territory by European powers — despite all the wars fought among themselves. The way in which juridical questions were posed in international law at that time lacked the most important distinctions because, after Grotius and Pufendorf, the differences in territorial status as well as those appertaining to a general concept of war were no longer handled by jurists.

Such a science of international law could no longer remain conscious of its own historical premises. It split into two antithetical tendencies. On the one side, a systematic philosophical approach based on natural law (Pufendorf, Thomasius, Christian Wolff and Kant) sought to produce a purely intellectual system of thought independent of any state secrecy in order to maintain a type of *potestas spiritualis*. Theoretically, this led to such neutral humanitarian entities as "mankind" as a whole and *civitas maxima*; in terms of concrete practice and matters internal to the state, it

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led to the promotion of the *Rechtsstaat* and civil society based on individualism as the constitutional world standard. On the other side, however, a practical-positivistic approach (Samuel Rachel [1628-1691], Johann Wolfgang Textor [1638-1701], Johann Jacob Moser [1701-1785] and Johann Ludwig Klüber [1762-1837]) turned the jurist into a mere assistant to the state and a mere functionary of the legality of a *status quo* fixed in international treaties. This gave him the advantage — *vis-à-vis* philosophical international law — of closer proximity to the positive material, thereby elevating the jurist of international law to the rank of an initiate and giving him access to the *arcana* of foreign policy.

Both Grotius and Pufendorf, the two most celebrated and influential teachers of international law in the 17th century, belong to this situation in legal history. They are by no means pioneers in the sense of having formulated the fundamental concepts of the new international law among states, least of all the new concept of war. This honor goes not to them but rather to those jurists of the last decades of the 16th century: Ayala and Gentili. In comparison with Bodin's conceptual clarity, Grotius' method was a scientific regression or, euphemistically speaking, a "conservatism."[57] Grotius was no trailblazer, but he cleared the path to the Enlightenment for jurisprudence with his "natural religion." His fame in the history of law is based "*par droit de conquête*," which is why he finds his place between Suarez and Hobbes, i. e., between scholastic theologians and modern philosophers.

For a consideration of international law, the following authors must be included among those whose thinking is juridical in a specific sense — first of all, Bodin, then Ayala, Gentili and Zouche — because they made the concept of *iustus hostis* fruitful for the new international law among states. Grotius had a strong, general pathos for justice, but no juridical and scientific awareness of the problems. This may be the very reason for his irrepressible popularity. From the standpoint of propaganda, this serves a practical purpose. Grotius and Pufendorf had different styles and methods. As a court historiographer, Pufendorf was no stranger to the *arcana*; from the standpoint of jurisprudence, he is a typical representative of the systematic philosophical approach. Like others such as Zouche, Grotius lacked the clear objectivity of a pragmatic jurist. Compared to the great philosophers, he belongs to the positivistic approach insofar as he confronted

57. In a short but substantial and intense book, Paulo Manuel Merea has established the proper place of Grotius in legal history. See *Suarez, Grocio, Hobbes: licoes de história das doutrinas politicas feitas na Universidad de Coimbra* (Coimbra: A. Amádo, 1941).

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many practical questions without a thoroughly considered system and without clear concepts, however quotable they may be.

As great as the contrast between the philosophical and the positivistic approaches may seem, none of these theoreticians of international law appears to recognize the central question, i.e, the new spatial order emerging with the European land appropriation of the New World. It threw them all into a confusion, such as would arise if the formulas of theologians, which still presupposed the medieval spatial order of the *respublica Christiana*, were combined with concepts lacking any spatial sense — similar to those adopted by humanistic jurisprudence from the civil property rights of Roman law. Only in the second half of the 18th century did jurists of international law begin to appreciate the spatial problem of a European *equilibrium*. Yet they held to an internal European perspective and, for the most part, did not see that the order of the *ius publicum Europaeum* was already global.

It is easier to understand how purely pragmatic positivists failed to recognize the problem of a global spatial order. With Grotius and Pufendorf, however, mention of the global lines of their time, amity lines in particular, is so incidental and peripheral that, for this reason alone, the international law expositions of both touch only on secondary disputed questions and miss the concrete structure of the European international law of their time. Nevertheless, both retained some memory of the reality of land appropriation, even though they failed to draw any connection between their concepts of original property rights and the very concrete land appropriation of non-European territory by European powers taking place on a gigantic scale before their very eyes in western and eastern "India."

Grotius alone became the creator and innovator of a new civil law construction that today all jurists take for granted, most without being aware of its origin. Specifically, he found the distinction between original and derivative acquisition of property, which arose in the 17th century. In reality, this distinction was impressed upon the Dutch jurist through efforts to find a new *nomos* of the earth, which had become necessary as a result of the great land appropriation. The antithesis of original and derivative land acquisition was obvious at the time because, despite many treaties concluded by the European discoverers and conquerors with native princes and chiefs, no European power considered itself the legal successor of the natives. Rather, they regarded their colonial land acquisitions as original both with respect to the earlier non-European inhabitants as well as to their European rivals. From the standpoint of the history of civil law, the distinction of original

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and derivative acquisition is not classical. More precisely, it derives from a chapter in Grotius' *De iure belli ac pacis*.[58] The distinction became one of the most remarkable cases of the further development of Roman civil law occasioned by projections of a situation in international law that became intellectually effective before it became juridically recognized.

Grotius speaks in general terms, without any reference to America, of a land division, a "*divisio*," as a type of original property acquisition that occurred in ancient times. By "*divisio*" he understands the "*divisio primaeva*" — the first original land division and land appropriation. He articulates this thesis at the beginning of the chapter and it is the point of departure for a subsequent exposition on property acquisition, though it refers only to material property and remains entirely on the level of civil law.[59] As for Pufendorf, he recognizes a type of original property acquisition that takes the form of a "common seizure by a majority of persons." He characterizes it as the creation of "general property" and thus distinguishes it from the origin of specific private property."[60] This is very close to actual land appropriation.

Unfortunately, these glimmers were quickly extinguished because immediately they became part of a discussion of the acquisition of private material property. For this reason, it is easy to distinguish the question of original property acquisition within an organized and settled community from the entirely different question of the land appropriation of a particular territory by a community (with the ensuing "division"). By the same token, any jurist should be able to understand that the land appropriation of an entire people is "original" in a completely different sense than the acquisition of land by a single member of the group. Both Grotius and Pufendorf distinguish between *ius gentium* and *ius civile*; both emphasize the difference between public authority (*imperium* or *iurisdictio*) and private or civil ownership (*dominium*). Nevertheless, neither deals with the

58. Cf. Hugo Grotius, *De iure belli ac pacis* (1625), reprint (The Hague: Martinus Nijhoff, 1948), Book 2, Chap. 2. See Barone Pietro de Francisci, *Il Transferimento della Proprietà: Storia e Critica di una Dottrina* (Padova: L. Litotipo, 1924), p. 116; Valentin-Al. Georgescu, *Études de Philologie Juridique et de Droit Romain*, I, *Les Rapports de la Philogogie Classique et de Droit Romain* (Bucharest and Paris: Librairie A. Rousseau, 1940), pp. 336, 343 and 390. See the review of Georgescu's book by W. Hellebrand in *Zeitschrift der Savigny-Stiftung, Rom. Abt.*, Vol. 61 (1941), pp. 451-457.

59. Grotius, *De iure belli ac pacis*, *op. cit.*, Book 2, Chaps. 2 and 3. The point of departure is the thesis: "Singulare iure aliquid nostrum fit acquisitione originaria aut derivativa. Originaria acquisitio olin fieri potuit etiam per divisionem."

60. Pufendorf, *De iure naturae et gentium*, Book 4, Chapter 6 (Acquisition by virtue of the right of the initial occupant).

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central question — the European appropriation of non-European territory. They leave *ius gentium* in the grey area that obtains when concepts of Roman civil law are elevated to generalities of natural law and leave the concept of "*occupatio*" in an even greyer area — between *ius gentium* and *ius civile* as well as between the acquisition of *imperium* (or *iurisdictio*) over human beings and the acquisition of *dominium*, i. e., private ownership of things. Whereas Vitoria still has the central problem in view — the legitimacy of the European appropriation of American territory, and this as a procedure *iure gentium* — these ostensible founders of modern international law speak only of the acquisition of things in general.

Again, the title of acquisition that occupation represents pertained only to relations between the land appropriating European powers. However, the first question in international law was precisely whether the lands of non-Christian, non-European peoples and princes were "free" and without authority, whether the non-European peoples were at such a low stage of civilization that they could become objects of organization by peoples at a higher stage. This is the question Vitoria poses so clearly and answers so negatively. For 17th and 18th century international law, this was no longer an essential question; its practical interest was directed to the struggle between European states on European soil ignited by the land appropriation of the New World. The legal title of the Portuguese and the Spanish, based on papal awards of missionary mandates, was no longer applicable. This left discovery and occupation as the only legal title to land appropriation recognized by the European powers among themselves.

Thus European jurists could and did portray discovery as a component of occupation, often in a vague way.[61] Civil jurists considered the mere act of finding a previously unknown land too uncertain to constitute the basis for a title of acquisition. When they spoke of occupation, what they had in mind was a material thing — an apple, a house, or a plot of land. There was hardly any mention in the 17th century of the freedom of missions and the freedom of propaganda, which had such great significance

61. Goebel praises Johann Gryphiander's (Griepenkerl) *Tractatus de insulis* (1623) for having reestablished Roman law under modern conditions. See *The Struggle for the Falkland Islands*, *op. cit.*, pp. 115ff. Gryphiander insists upon "*invenire*" and "*corporalis apprehensio*" and means that where there is no *dominium* there is also no *territorium*, i. e., no *imperium* or *iurisdictio* of the prince. Compared to those of Grotius, his explanations are refreshingly clear. But he does not solve the great problem of the European land appropriation. He logically proceeds from private law to public law, which in many cases expresses the reality of French, Dutch and English land appropriations, but misses precisely the Spanish *conquista*, which was not at all private and to this extent was purely a matter of public law

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for Vitoria. With Pufendorf, even *liberum commercium* ceased to be a legal aspect of *iusta causa*. It was simply dropped, like "natural law," in favor of a state mercantilism that had become increasingly a matter of course.[62] By then, the spatial form able to support a specifically new international law — the *ius publicum Europaeum* — had crystallized.

62. Pufendorf, *De iure naturae et gentium*, Book 4, Chapter 5 (at the end).

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Notes and Commentaries:

*Carl Schmitt Revisited**

Ernst-Wolfgang Böckenförde

Today, interest in Carl Schmitt is astonishing. Now he can be freely cited, whereas only a decade ago quoting him in an uncritical or non-perjorative way exposed the author to demands for a justification and raised the suspicion that, overtly or covertly, the author was a "Schmittian" and therefore a danger to democracy — someone to be watched. Essays and monographs about Schmitt are increasing in a way that would have been inconceivable shortly after his death (1985) — not to mention the steady appearance of new editions as well as numerous translations of his work in foreign languages.[1] Nowdays hardly a month goes by without the publication of a book dealing entirely or primarily with Schmitt. The themes of this literature are wide-ranging, touching on all of Schmitt's works, beginning with constitutional and international law, moving to

* This is the edited text of a lecture, "Carl Schmitt in der Diskussion," originally delivered April 13, 1997 on the occasion of the 600 anniversary of the city of Plettenberg — where Carl Schmitt was born and lived a good part of his life. Translated by Michael Richardson.

1. To begin with his writings — based on Helmut Quaritsch's list compiled in the Fall of 1996, on the occasion of a lecture he delivered in Japan on the relevance of Carl Schmitt (see Helmut Quaritsch, "Carl Schmitt's Actuality in Constitutional and Political Fields" [unpublished manuscript]) — the *Verfassungslehre* (1928) leads with the 8th edition having appeared in 1993, followed by *The Crisis of Parliamentary Democracy* with 7 editions, *The Concept of the Political*, *Die Diktatur* and *Political Theology* (1922) with 6 editions each, *Political Romanticism* as well as *Legalität und Legitimität* with 5 each, *Theorie des Partisanen*, *Hüter der Verfassung*, and *Politische Theologie II* (1970) with 4 editions each. As for translations, *The Concept of the Political* has been translated, or is being translated, into 15 languages, including Japanese, Swedish, Serbo-Croatian, Polish and Bulgarian, in addition to the major languages of English, French, Spanish, and Italian; followed by *Political Theology* (1922) and *The Crisis of Parliamentary Democracy*, with translations into 13 and 8 languages respectively. Schmitt's classical juridical works, on the other hand, have only been translated into 3 to 5 languages: *Verfassungslehre* has been translated into Spanish, Italian, Japanese, French, and Korean. These figures are based on a list provided by Duncker & Humblot on March 12, 1997, as well as on information received from Prof. Piet Tommissen April 4, 1997. They indicate the extent to which Schmitt is perceived abroad more as a political theorist than as a constitutional jurist, while in Germany he is always recognized first and foremost as a constitutional jurist.

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contemporary history, the theory of the state, the political and, naturally, political theology.[2] Much of this interest stems from the publication of the *Glossarium* — Schmitt's diaries written between 1947 and 1951 — as well as from Dirk van Laak's book.[3] The latter reveals how, while Schmitt's public impact came to an end, he was having a hidden but possibly far-reaching influence on future German intellectual elites. That revelation was met with astonishment and in some quarters even anger, which conclusively exposes the futility of efforts to exclude Schmitt from intellectual discourse or keep him at a distance. Indeed, today Schmitt is more relevant than ever.

I

What is most interesting about the growing attention to Schmitt's work since the early 1990s is that it is increasingly focused on his ideas, while questions concerning his personality are gradually receding to the background. This has paved the way for an objective examination. For decades, particularly in Germany, Schmitt and his work were dealt with from the viewpoint of coming to terms with the past. Explicitly or implicitly, the fundamental issue was his colaboration during the Third Reich. From this perspective, the focus was on the continuity of his work: was he an opponent of democracy from the very beginning, or was he a conformist opportunist who often changed his position? Now attention has moved away from such questions for essentially two reasons. Those who deal with Schmitt now are part of the post-1945 generation or, as is more often the case, of the post-1960 generation. For them, Schmitt as a person is no longer interesting. Particularly since his death, this has become merely a question of history. What interests them is the subject matter, i.e., what Schmitt has written, what led him to the positions he took, and what these positions were. They are no longer interested in controversies about his personality, such as discussed by Bernd Rüthers.[4]

Secondly, many of the themes discussed by Schmitt during the Weimar Republic and after 1945, such as the problem of the state or the formation and persistence of political units, have become increasingly relevant. This is not merely of interst in Germany and other European countries. Problems that

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2. Quaritsch has compiled a list of writings on and by Schmitt. See Quaritsch, "Carl Schmitt — Bibliographie selbstnd 1. Sept. 1996," supplement to "Carl Schmitt's Actuality in Constitutional and Political Fields," *op. cit.*, pp. 4-10. Of the books he includes — a selection primarily limited to West and South European sources, which is by no means exhaustive — 10 were published between 1931 and 1943, 38 during the 40 years between 1945 and his death in 1985, while 83 titles have appeared between 1986 and 1996.

3. Dirk van Laak, *Gespräche in der Sicherheit des Schweigens. Carl Schmitt in der politischen Geistesgeschichte der frühen Bundesrepublik* (Berlin: Duncker & Humblot, 1993).

4. Bernd Rüthers, *Carl Schmitt im Dritten Reich*, 2nd expanded ed. (Munich: C. H. Beck, 1990); and *Entartetes Recht. Rechtslehren und Kronjuristen im Dritten Reich*, 2nd ed. (Munich: C. H. Beck, 1989).

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seemed obsolete during the halcyon days of the economic miracle and limited sovereignty with respect to foreign policy have come to the fore once again. An objective approach to texts, independently of the narrow viewpoint concerning coming to terms with the past, is much more useful.

The distanced objectivity gaining ground in the examination of Schmitt is by no means uncritical.[5] In fact, it is precisely the intensity with which one approaches Schmitt's texts that allows an impartial critical engagement and leads to further knowledge of the subject. Thus a member of this younger generation claims that insights, concepts and polemics related to Schmitt's work are interesting not because they are Schmitt's products but rather because they reflect the coming of age of an elite that has witnessed the transition to an industrial mass society.[6] This way of dealing with Schmitt's work confirms that, over a decade after his death, he has become a "classic" — a classic whose biography recedes behind his scientific and literary work. One reads the texts or about them, gains insights from a distance and reflects on them in terms of questions and problems of one's own times. Often, during his Plettenberg retreat, Schmitt used to cite the phrase "*doceo sed frustra*" ("I taught but in vain") with resignation. Today interest in his work has refuted this claim and one could say instead: "*non frustra docuisti*" ("you have not taught in vain").

II

What are the issues which have made discussion about Schmitt so intense today? Years ago, Quaritsch sought to establish where Schmitt stood on the basis of Schmitt's collection of essays, *Positionen und Begriffe*. Next to "Schmitt the Catholic," Quaritsch listed additional characterizations corresponding to what he wrote: the nationalist, the étatist and (during the years between 1933 and 1936) the convert.[7] These charactrizations deserve to be examined critically.

a) Schmitt as a "nationalist": with the possible exception of Günter Maschke, this is hardly being discussed. There is nothing provocative or interesting about Schmitt as a nationalist. Along with most Germans at the time, before and during the Weimar Republic, Schmitt was a nationalist. His opposition to the Treaty of Versailles, his critiques of the League of Nations and of the Rhineland as an object of international politics[8] are well-known and documented

5. This is particularly clear in the volume from Andreas Göbel, Dirk van Laak and Ingeborg Villinger, eds. *Metamorphosen des Politischen. Grundfragen der Politischen Einheitsbildung seit den 20er Jahren* (Berlin: Akademie Verlag, 1995).

6. Thomas Vesting, "Die Permanente Revolution. Carl Schmitt und das Ende der Epoche der Staatlichkeit," in *Metamorphosen des Politischen*, *ibid*., p. 193.

7. Helmut Quaritsch, *Positionen und Begriffe Carl Schmitts*, 2nd expanded ed. (Berlin: Duncker & Humblot ,1991) pp. 25-82 and 83ff.

8. See Carl Schmitt, *Die Rheinlande als Objekt internationaler Politik* (Cologne: Verlag der Rheinischen Zentrumspartei, 1925); and *Die Kernfrage des Völkerbundes* (Berlin: Duncker & Humblot, 1926).

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in many of his writings. That does not mean, however, that he considered the nation and belonging to it something determining the very essence of human existence, i.e., something determining the course of history and providing political events and human existence their meaning. What sounds nationalistic today must be examined in the context of the climate at the time: it was part of a strong opposition by all German social and political forces to the Treaty of Versailles. A quotation may help clarify the matter: "The German people have been starved and subdued. An admission of guilt has been extorted from a broken people. Conditions have been imposed on them that annihilate their existence as a nation and a state, destroy their economy, abandon millions to a slow death and keep the rest in unbearable servitude and slavery. In the history of the Middle Ages or of modern times there has never been a document that flies in the face of all human and Christian principles like the *Diktat* from Versailles." Who could have written this and when? From today's standpoint, could he be classified as anything but someone on the Right — even the extreme Right? The quotation is from Konrad Adenauer's inaugural address as president of the 1922 Catholic Congress in Munich.[9]

b) Schmitt the étatist — this is becoming increasingly interesting. Why and how did Schmitt ground, support, legitimate, and defend the state as a political order — and for how long? What constitutes the concept of the state, its basis and precondition, its location in political relations? Why was the defense of the state ultimately dropped leading to the assessment, pronounced so decisively, that "The epoch of the state is now coming to an end. Not another word should be wasted on it"?[10] These questions are repeatedly raised from various quarters. The answers, of course, differ. They do show, however, how much this examination of Schmitt's work helps understand an entire epoch of reflection on the formation and preservation of political unity. Not a few authors understand Schmitt's work on the state and the constitution as a fundamental critique of the intellectual and political bases of Western liberalism, through which the foundations of the state's political unity and unification in and by way of the state are dissolved. On the other hand, what is revealed is the extent to which Schmitt's advocacy of the state related to an independent political power unit with its own authority — not to the state as a moment of the self-organization of society — and to what extent is the possibility of such a state tied to the representation of an idea in and through the state — to the connection between rule and transcendence. Without

9. This text is documented in Ernst Rudolph Huber and Wolfgang Huber, *Staat und Kirche im 19. und 20. Jahrhundert. Dokumente zur Geschichte des deutschen Staatskirchenrechts*, Vol 4 — *Staat und Kirche in der Weimarer Republik* (Berlin: Duncker & Humblot, 1963) p. 385.

10. Carl Schmitt, *Der Begriff des Politischen*. Text from 1932 with a preface and three corollaries (Berlin: Duncker & Humblot, 1963), p. 10. [English: *The Concept of the Political*, tr. by George Schwab (Chicago: The University of Chicago Press, 1996)].

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such a connection, the state would only be a form of power and will to power — an empty form incapable of constituting political unity beyond a mere consolidation of power. Does this express itself in the impossibility of going beyond the political-theological perspective in constitutional thought?[11] This could also help explain why, to his students surprise shortly after 1933, and much more so after 1945, suddenly Schmitt diagnosed the end of the epoch of the state. Had it not become obvious during and particularly at the end of the Weimar Republic that the state — not just the Weimar state, but the European democratic states in general — were no longer able to represent an idea, that every myth of the state had collapsed, and that this, particularly after 1945, could not be reversed?

c) Schmitt as a "convert." This applies to the period between 1933 and 1936/37. Here Quaritsch may be making a mistake. Schmitt would have written him: "Dear Helmut Quaritsch, how can you define me as a convert to National Socialism? Do you not know how much I have been and am against conversion — even with respect to conversion to the Catholic Church — and did you not read *Ex Captivitate Salus*? Is it so difficult to decipher this text?" Certainly he knows the text, but maybe the designation of convert was an attempt to provide an alternative to the popular cliché of the opportunist or the zealous conformist. As usual, "convert" implies a change in belief or of inner conviction. To come to this conclusion on the basis of the literary and journalistic statements of those years is surely a mistake. It is also inconsistent with the designation of Schmitt as a Catholic. Those who converted to National Socialism seriously had to renounce Catholicism. That cannot be said of Schmitt, even during the 1933-36 period. Perhaps Schmitt's position during the years can best be characterized as that of an engaged team-player. This is consistent with the facts, while leaving open the question concerning the motivation and the objectives that led him to play along.

d) Recent discussion has not stood still. It searches for what, somehow, holds together Schmitt's scientific work with all its various positions and his journalistic work, and makes it possible to explain it plausibly. While such an effort may seem futile, it is often made, especially since the publication of the *Glossarium*. Here the discussion of Schmitt as a "political theologian"[12] is relevant. Recently, this discussion has caused a great deal of commotion, occasionally resulting in confusion. In order not to succumb to such confusion, a distinction must be made. On

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11. Reinhard Mehring, "Geist gegen Gesetz. Carl Schmitts Destruktion des positiven Rechtsdenkens," in B. Wacker, ed. *Die eigentlich katholische Verschärfung. Konfession, Theologie und Politik im Werk Carl Schmitts* (Munich: W. Fink Verlag, 1994) discusses the relevance of Schmitt's thought with respect to this question.

12. See Wacker, *Die Eigentlich katholische Verschärfung . . ., op. cit.*; Günther Meuter, *Der Katechon. Zu Carl Schmitts fundamentalistischer Kritik der Zeit* (Berlin: Duncker & Humblot, 1994); Heinrich Meier, *Die Lehre Carl Schmitts. Vier Kapitel zur Unterscheidung von Politscher Theologie und Politischer Philosophie* (Stuttgart/Weimar: J. B. Metzler Verlag: 1994); Felix Grossheutschi, *Carl Schmitt und die Lehre vom Katechon* (Berlin: Duncker & Humblot, 1996).

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the one hand, political theology concerns the translation of theological into constitutional concepts as well as the reorganizations involved in this translation. On the other hand, it concerns theological doctrines which have as their object the evaluation of political orders as well as historical occurrences both in general and in their particular manifestations and the consequences thereof for human behavior. In this second sense, even before the *Glossarium* became widely known, Heinrich Meier saw Schmitt as a political theologian.[13]

This means that what lays behind his work, and indeed his shifting positions, is his faith — theological and historical interpretation with permanent existential meaning. That was and is now partly misunderstood — as if Schmitt should be stylized into a theologian and his various works explained merely as means to unfold theological positions. Thus Schmitt the jurist, the constitutional and international lawyer, and even the political theorist is disputed. But that is not what it is about. If one follows Meier's interpretation[14]— an increasingly popular one which, in my opinion and in light of many personal conversations with Schmitt, there are good reasons to adopt — it only means that there are two occasionaly intertwined levels of argumentation in Schmitt's work. Schmitt traces them in his work in terms of profane science, arguing and analyzing with its methods and within its horizons of knowledge. On the other hand, he is influenced as to why and in which form he takes up certain themes and positions out of the religious convictions and interpretations in which he is deeply rooted and which propel him to act. Yet this remains essentially hidden. It is not communicated on the level of science or it is communicated only encryptically. After all, how should it be understood in a secular society? What remains unclear here is the extent to which these religious convictions and interpretations are genuine Catholic convictions — convictions within a ecclesiastical framework — or those of a more personal kind. By themselves, these convictions do not protect one from mistakes or inappropriate behavior.

This discussion thus leads from the work back to the person, but with intentions completely different from the ones stemming from efforts to come to terms with the past. Then as now, this discussion is in flux. But it seems (and this is my personal opinion) that the cipher of "political theology" is the key to Schmitt. Theologically formulated, this could be the *katechontic* vouching for divine truth in the struggle with the forces of the antichrist and his kingdom. Secularly formulated, it could mean hostility to Western liberalism, including its intellectual and political bases. Would this secular enemy then be the embodiment of Schmitt's own question?

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13. Heinrich Meier, *Carl Schmitt, Leo Strauß und "Der Begriff des Politischen." Zu einem Dialog unter Abwesenden* (Stuttgart: J. B. Metzler Verlag, 1988), especially section IV, pp 47ff. [English: *Carl Schmitt and Leo Strauss, the Hidden Dialogue*, tr. by S. Harvey Lomax (Chicago: University of Chicago Press, 1995)].

14. This is further developed and substantiated in Meier, *Die Lehre Carl Schmitts, op. cit.*

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Ostracizing Carl Schmitt: Letters to The New York Review of Books

For a number of reasons having to do with the timing of its founding, its geographic location, its frequency, its interdisciplinary character, and most of all the parochialism of American academic life, *The New York Review of Books* has become the most prestigious American intellectual magazine. As such, it has also become the voice of what there is of an academic establishment and thus the victim of an uncritical conservative conformism unaware of its political role as the apologist for whatever the *status quo* of any given time.

Today, the hegemonic ideology happens to be a self-righteous liberalism which, still gloating over the demise of its Cold War nemesis, refuses to entertain the possibility that it too is an historical product with a beginning and an end. The tolerance and open-mindedness of its youth, when it struggled against "the forces of superstition and myth," has now given way to a frightened, defensive posture attempting to define the limits of criticism and contain all discourse within its own ideological horizons — the very same dogmatic posture of that orthodoxy it successfully replaced.

This may help explain why the academic establishment, hypostatized to the level of a new priesthood by the liberal division of labor, is so adamant in its futile efforts at ostracizing Carl Schmitt — probably the 20th century's most profound critic of liberalism, who spent most of his life prefiguring liberalism's inevitable demise. It may also help explain why, confronted with a veritable flood of new publications by or dealing with Schmitt, *The New York Review of Books* may have felt compelled not only to assign a hatchetman to dispose of the whole enterprise once and for all, but also to refuse to publish all subsequent challenges to Mark Lilla's caricature of "The Enemy of Liberalism."[1] The following two letters, by G. L. Ulmen and Paul Gottfried, were originally drafted as responses to Lilla but never published by the editors of *The New York Review of Books*.

Committed to a dogmatic linear theory of history predicated on "progress," today's statist version of liberal thought cannot conceive of the future as anything but an extension or further refinement of the present. Consequently, all radical alternatives predicated on different models can only be classified as "regressive" and evil: out of bounds of officially sanctioned "acceptable discourse." Since, however, the academic *apparatchiki* entrusted with certifying the political correctness of intellectual discourse by legitimating "liberalism's genuine philosophical critics" and demonizing "those who practice the politics of theological despair,"[2]

1. See *The New York Review of Books*, Vol. XLIV, No. 8 (May 15, 1997), pp. 38-44.
2. *Ibid.*, p. 44.

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do not have any police agencies at their disposal, Lilla's tirade is doomed to fail. Schmitt's ideas will continue to receive the attention and criticism they deserve. Ironically enough, in the long run this will probably benefit liberal political thought more than its apologists' often dishonest dismissals of what they think will advance their careers.

Not unexpectedly, Lilla's examination of Schmitt's work begins with a deceptive premise refuted later in the text — after the damage has been done. He observes that there is a growing interest in Schmitt's work, despite "increased awareness of the circumstances surrounding Schmitt's active collaboration with the Nazi regime." The implication is that only now are the details of this collaboration coming to the fore and, presumably, those mesmerized by Schmitt's ideas display "a remarkable lack of seriousness" by their "unwillingness to probe too deeply into his moral universe." Presumably, had they known the full story, they would have been more "serious," i.e., critical. But Schmitt's writings published during the Nazi period have always been accessible[3] to those interested in reading them, and practically every American publication on the subject has been prefaced *ad nauseam* by some discussion of his anti-Semitism and collaboration.[4] The question is whether only St. Francis of Assisi and the like should be allowed to do political theory, or whether, despite their author's dubious morality, ideas can be evaluated on their own, without any *reductio ad hominem*. Having established that Schmitt did write all the awful things he did about the Jews and collaborated with the Nazis until the SS discredited him for being a hypocrite, can his criticism of liberalism be rationally evaluated? Or should his books be summarily dismissed before any careful scrutiny as "lachrymose, self-pitying notebooks" articulating "the messianic longing of an aging apocalyptic thinker"?

This inquisitorial, self-righteous attitude leads Lilla into misreading what he inaccurately and anachronistically labels "left-wing Schmittianism" (since most of the people he has in mind have long since dropped the Left-Right political paradigm as obsolete) as "one of the more curious phenomena of recent European intellectual history." But what has led many "1968 radicals" to study

3. With the exception of Schmitt's recently published *Glossarium* and *Gutachten*, all of Schmitt's most compromising works have always been known. The first *Telos* "special issue" on Schmitt even translated into English and published for the first time anywhere the transcripts of Schmitt's interrogations by the American authorities after WWII, to establish whether to indict him as a war criminal in the Nuremberg trials. See Joseph W. Bendersky, "Carl Schmitt at Nuremberg," in *Telos* 72 (Summer 1987), pp. 91-96.

4. Not incidentally, the *Telos* "special issue" on Carl Schmitt was subtitled "Carl Schmitt: Enemy or Foe?" Unfortunately, few readers, least of all Lilla, got the point. It was not a typo, but played on Schmitt's own distinction between *inimicus* and *hostis*: one is an adversary to be confronted as an equal, whose claims may have some validity and who at least should be understood; while the other is an implacable opponent to be annihilated without further ado. By approaching Schmitt as "a foe," Lilla ends up systematically misunderstanding what Schmitt meant by "the political" and misreading all of his books. See G. L. Ulmen, "Return of the Foe," in *Telos* 72 (Summer 1987), pp. 187-193.

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and learn from Schmitt was not so much the fact that his work dealt with "sovereignty, national unity, the dangers of ignoring enmity between nations, constitutional stability, war," etc., but the belated realization that neither Marxism nor liberalism had any political theory and in fact had depoliticization as one of their main objectives.[5] Having no clue as to what Schmitt meant by "the political," Lilla and other run-of-the-mill liberals may be unfazed by this state of affairs. It did, however, have an impact on 1968 radicals concerned with the dehumanization of post-industrial society, the erosion of community, and the disintegration of individuality — themes hitherto subsumed under the heading of "alienation" but impossible to tackle effectively by deploying the welfare state remedies routinely proposed by either Marxism or liberalism.

Had Lilla bothered to read carefully Schmitt's *Roman Catholicism and Political Form* or any of his other books, he might have realized that Schmitt's critique of liberalism has to do with the reduction of all to the economic dimension where, in Marxist parlance, everything becomes exchange value and anything reminiscent of or associated with, e.g., Marx's *Guttungswesen* (personal identity, values, ideals, etc.) is systematically eliminated. The result is nihilism, or what in *The Communist Manifesto* Marx and Engels describe as the lot of the proletariat under capitalism. Originally developed to put an end to the religious wars, liberalism presupposed the pre-existing political organization of various organic communities whose relations the state was meant to mediate. The liberal state, however, succeeded beyond all expectations and, in the process, also turned into a depoliticizing agency seeking to eliminate all intermediate political institutions between itself and individuals.

This is why Schmitt regarded the Catholic Church as one of the highest achievements of Western rationalism. As a *complexio oppositorum*, it was able to guarantee the political autonomy of its constituting parts within a broad axiological horizon allowing a conflictual yet relatively non-destructive coexistence among them. The same theme reappears on the international level, with the

5. After having exhaustively examined Hegelian Marxism and the Frankfurt School and having reached these conclusions in the mid-1980s, *Telos* opened its pages to forgotten or otherwise repressed theoretical alternatives. Since by that time "critical thought" had deteriorated to the level of another fashionable academic subdiscipline, *Telos* sought to dissociate itself from such trends. This precipitated a split within the editorial board and resulted in the resignation of those editors about to be tenured or hired by prestigious universities who had opportunistically chosen to retreat to the safety of liberal positions and academic conformity. Thus, in jest, for a couple of issues (numbers 70 and 71) *Telos* redefined itself as "a journal of post-critical thought." Lilla, who had to go back almost 10 years to find these issues, misses the whole point and, since this incident happened to coincide with the rediscovery of Schmitt's thought, reads it as a conservative involution and a turn in the direction of the "gurus of the European new right such as Gianfranco Miglio and Alain de Benoist." That *Telos* continues to publish contributions from all sides of the old political spectrum (which it no longer recognizes as useful) does not prevent the academic guardians of political correctness from classifying the journal as terminally right-wing.

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institutionalization of the *ius publicum Europaeum* in Europe and, one might add (since Schmitt never discussed it) the 1787 founding of the US as a federation. The decline of the *ius publicum Europaeum* and the deterioration of the American federation into a centralized nation-state implied a depoliticization which has not only had devastating consequences on the international level (by ushering in total war), but, by contributing to the reduction of people's concrete communitarian identities to abstract individualism, has plunged liberalism itself into a major crisis. This crisis obtains not only on the international level, where, despite vacuous appeals to "human rights" and other arbitrary "universal" principles, war and enmity deteriorates into genocidal conflicts subject to no regulation; but also on the domestic level, where the disintegration of communities and families results in criminality, self-indulgent drug abuse, and growing psychic dysfunctions.

The liberal solution to all this has been the development of the therapeutic state which, despite its lofty ideals, increasingly pits a tendentially totalitarian government against a populace whose every particularity is interpreted as a pathology. Consequently, the therapeutic state finds itself mired in the counterproductive project of attempting to homogenize, standardize and effectively eliminate all remaining political particularity — precisely that particularity which in Western societies still comprises a great deal of traditional residues and was thus able to inhibit considerably the disintegration of communities and people into a mass of dependent abstract individuals. Schmitt did not explicitly address the problem of the New Class and its therapeutic state (although his critique of legal positivism and parliamentarism prefigured precisely this problematic[6]), but his insistence on the primacy of "the political" is a call for developing new political forms able to avoid such a disastrous outcome.

This may also help explain why, along with other German intellectuals dealing with similar issues at the time, he could see National Socialism as a possible alternative (which in no way allows any alternative interpretation of his often vitriolic anti-Semitism other than in terms of the most abject opportunism).[7] To his credit, Lilla has resisted the usual liberal temptation of hypostatizing anti-Semitism

6. This critique is developed by Schmitt primarily in his *Über die Drei Arten des rechtswissenschaftlichen Denkens* (Hamburg: Hanseatische Verlagsastalt, 1934) — an essay which, typical of Schmitt's work at the time, closes with a bizarre and opportunistic apology for the primacy of the Führer and the Nazi regime.

7. Aside from this opportunism, Schmitt's account of Jews often comes close to the characterization provided by Marx in "The Jewish Question," where, from a racial category, "Jewishness" turns increasingly into a particular social type for which the economic dimension is decisive. More important for Schmitt, however, is the Jews' relation to territoriality, or their lack of a territory, which prevents them from developing a legitimate political identity and forces them to overemphasize the primacy of economics, thus turning into liberal agents *par excellence*. This is one of the more interesting points made by Wolfgang Palaver in his otherwise problematic "sacrificial" analysis of "Schmitt on *Nomos* and Space," in *Telos* 106 (Winter 1996), pp. 105-127. For a critique of Palaver's analysis, see Gary Ulmen, "Schmitt as a Scapegoat," in the same issue, pp. 128-138.

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as the organizing principle of Schmitt's thought and has chosen instead to follow Heinrich Meier in demonizing him as a "political theologian." What this shows, however, is that Lilla has no understanding of Schmitt's political theology. Far from having anything to do with theology as such, it simply refers to the structural isomorphism between theological and political concepts — another way of saying that Western political institutions are the secular derivations of that Judeo-Christian tradition liberals think they have long left behind.

A proper understanding of political theology's vindication of the primacy of the traditional dimension rather than as the reactionary ravings of a racist lunatic may have prevented Lilla from making the usual mistake of interpreting Schmitt's political position as exclusively "decisionist." Although decisionism is prominent in Schmitt's writings during the 1920s, he gradually came to emphasize *Ordnungsdenken*, the primacy of traditional institutional orders, as a more stable source of legitimacy and, as such, a possible alternative to liberal depoliticization and disintegration. Since he thought it impossible to eliminate the political, he inquired whether these territorially-defined traditional institutional orders might provide the bases for new political units able to displace the nation-state. The recent rise of multiculturalism testifies to the insightfulness of Schmitt's claim about the permanence of the political. Although, as a statist liberal reaction to depoliticization (which does not question but supports the state's therapeutic role), multiculturalism does not ultimately succeed in reintroducing the political into social life, it is predicated on the friend-enemy antithesis and presents itself as a project for reorganizing social life. At any rate, contrary to Enlightenment liberal assumptions concerning the terminal obsolescence of traditions, today the only social trends successfully resisting or reversing social disintegration are those appealing to established customs and able to refunction them to deal with new conditions. In understanding these new developments, as well as reinterpreting earlier ones, political theology is indispensable. At any rate, whatever one may say about Schmitt's work, it does not amount to a "politics of theological despair." If anyone has "learned nothing at all," it is Lilla himself.

Paul Piccone

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To the Editors, *The New York Review of Books*

Having written widely on Carl Schmitt, and even translated some of his works, including one "reviewed" by Mark Lilla, it is incumbent upon me to address the numerous inaccuracies and distortions of Schmitt's biography and thinking in Lilla's recent foray into what is for him obviously unfamiliar territory. I have no intention here of "defending" Schmitt, since in my view some of the choices he made both intellectually and politically are indefensible, but I am obliged to set the record straight. As a senior editor of *Telos: A Quarterly Journal of Critical Thought*, which Lilla disparages for dealing with Schmitt and even mistitles "A Quarterly Journal of Post [sic]-Critical Thought," I must also protest Lilla's "illiberal" attitude that there are certain subjects off-limits — not politically correct. *Telos* began as a left-wing journal, but in recent years its editors have recognized that such divisions as Left and Right, liberal and conservative, have become historically obsolete, that ideas from whatever quarter should be discussed and debated as we enter a new historical epoch.

I know Lilla mostly from his introduction to the collection titled *New French Thought*, which he pointedly titles: "The Legitimacy of the Liberal Age." He should have read the great liberal sociologist Max Weber, who observed that "the most contemporary form of legitimacy is the belief in legality," or, as one of Schmitt's most prominent students, Otto Kirchheimer, put it, "the legitimacy of parliamentary democracy resides in its legality," and this legality, as Schmitt observed, has become the "functional mode" of the bureaucratic state. Today, it is the functional mode of the "liberal" therapeutic state. In any case, I was impressed with Lilla's knowledge of contemporary French thought and even found his treatment in certain respects insightful. In particular, I share his appreciation of two figures he mentions, Louis Hartz and Raymond Aron, both of whom I had the good fortune to meet and talk with when I was a student. Not incidentally, the new French liberals Lilla discusses were largely inspired by Aron. In his article on Schmitt, Lilla mentions that Aron not only met and corresponded with Schmitt but considered him a "great philosopher" in the tradition of Max Weber. He seems perplexed by this, and seems not to know that one of Aron's most brilliant students, Julien Freund, wrote his doctoral dissertation (*L'essence du politique*, 1965) under the guidance of both Aron and Schmitt.

Lilla adopts a "friend-enemy" posture *vis-à-vis* Schmitt, which is clear from the title of his article: "The Enemy of Liberalism." Schmitt was not an "enemy," but rather a thoughtful critic of liberalism. which is clearly pointed out by Leo Strauss in his 1932 essay on Schmitt's *The Concept of the Political*: "We have said above that Schmitt is undertaking the critique of liberalism in a liberal world. We meant by this that his critique of liberalism takes place within the horizon of liberalism; his illiberal tendencies are arrested by the as yet undefeated 'systematics of

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liberal thinking.' The critique of liberalism that Schmitt has initiated can therefore be completed only when we succeed in gaining a horizon beyond liberalism. Within such a horizon Hobbes achieved the foundation of liberalism. A radical critique of liberalism is therefore possible only on the basis of an adequate understanding of Hobbes," which Schmitt certainly had. Schmitt was in fact the modern equivalent of Hobbes, as I indicated in a lecture many years ago. In Strauss' view, Schmitt was not the prophet of a post-liberal system; Schmitt's intention was "to do no more than provide a theoretical framework for an immense problem; the theses of his study are to be thought of as a starting point for objective discussion." This is why Schmitt and Strauss respected each other.

In Lilla's defense, he seems to have been taken in by the misleading works of Heinrich Meier. Whereas Meier's book, *Carl Schmitt and Leo Strauss*, is deliberately weighted against Schmitt, his latest work, *Die Lehre Carl Schmitts*, is nothing less than an attempt to demonize Schmitt by religious means. Lilla writes: "Meier remarks that Schmitt seemed to believe that the enemy is part of a divine order, and that war has the character of a divine judgment." He also contends that, according to Schmitt, "A world without war would be a world without politics." This is nonsense, as anyone knows who has studied *The Concept of the Political*, where Schmitt writes: "The definition of the political suggested here neither favors war nor militarism, neither imperialism nor pacifism. Nor is it an attempt to idealize the victorious war or the successful revolution as a 'social ideal,' since neither war nor revolution is something social or something ideal. War is neither the aim nor the purpose nor even the very content of politics." More to the point: "The political enemy need not be morally evil or aesthetically ugly."

Meier attempts to turn Schmitt into a "theological" thinker, which Lilla follows in attributing to Schmitt a "politics of theological despair." Lilla even writes: "One of Schmitt's half-forgotten but explicitly theological works is his early *Roman Catholicism and Political Form.* But had he bothered to read my introduction to this volume, which also contains my translation of Schmitt's 1917 essay titled "The Visibility of the Church," Lilla would have found the sentence: "Since Schmitt characterized his 1917 essay as a 'scholastic' consideration and his 1923 essay [*Roman Catholicism and Political Form*] as anything but, they do not constitute a uniform argument." Schmitt draws analogies between the Catholic Church and the sovereign state. But he is writing as a jurist — not a theologian. Both *Roman Catholicism and Political Form* and *Political Theology*, written at the same time, are complements to *The Concept of the Political.* Lilla would also have read in my introduction the following sentence: "The key to the relation between *Roman Catholicism and Political Form* and *Political Theology* is found in Schmitt's later assertion that political theology as such 'is not concerned with any theological dogma but with a scholarly-theoretical and conceptual-historical problem: the structural identity of concepts, of theological and juridical argumentation and cognition."

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Schmitt was first and foremost a jurist, and one who celebrated the separation of jurisprudence from theology. He was also a theoretician of the sovereign state, which he considered the "greatest accomplishment of occidental rationalism." Since he often used metaphors, he called himself a "theologian of jurisprudence," by which he understood himself to be a *kathechon* — a restrainer — of the excesses of legal positivism, i.e., of the legalization of all political (and social) life, characterized as "legalitarianism." Had Lilla bothered to look into Schmitt's book, *Der Nomos der Erde*, which I am presently translating into English, he would have found Schmitt's explanation of the historical turning point from the Middle Ages to the modern age, marked by the clear formulation of the centralized political unity of the sovereign state — *cuius regio, eius religio,* which Schmitt characterized with the decisive slogan of the epoch — *Silete theologi in munere alieno*, meaning that theologians (following the Reformation) should remain silent in matters of no concern to them. Lilla describes *The Nomos of the Earth* as "a mythical history of international relations," but it is a profoundly historical work about the epoch of the European sovereign state and Eurocentric international law. Hans Morgenthau considered it Schmitt's most brilliant work. Not incidentally, considering Lilla's disparagement of Schmitt as a political realist, Morgenthau, one of the preeminent theoreticians of American political realism and the teacher of Henry Kissinger, was strongly influenced by Schmitt in this regard.

Space does not allow me to mention all the misstatements in Lilla's article. But I cannot end without comment on Schmitt's reputed Nazism and anti-Semitism, so prominent in Lilla's article, beginning with the caricature of Schmitt, sitting in a wheelchair with a black leather glove on one hand. The obvious allusion is to Dr. Strangelove, but Schmitt bore no resemblance to Peter Sellars and he was never in a wheelchair or wore a leather glove.Lilla mentions Schmitt's work on *Constitutional Doctrine*, but fails to note it is dedicated to Fritz Eisler, one of Schmitt's closest Jewish friends, who fell in World War I. Nor does Lilla inform his readers that many of Schmitt's best students were Jewish and that there is no hint of anti-Semitism in any of his writings before the Nazi seizure of power, Instead, Lilla writes: "Although he was hardly in the vanguard . . . . his decision to join [the Nazi party] was not really surprising." In fact, it surprised and shocked many who knew Schmitt and enraged his Jewish students. Lilla even accuses George Schwab, the premier American Schmitt specialist, of attempting to whitewash Schmitt's "anti-Semitism." But had Lilla bothered to read Schwab's treatment (in *The Challenge of the Exception* and elsewhere) of Schmitt's anti-Semitic statements, he would have found a strong critique of Schmitt's "opportunism" in this respect. Since the Nazis killed many members of Schwab's family and he is an advisor to the Holocaust Museum in Washington, D.C., he ought to know a real anti-Semite when he meets one. Lilla writes: "Until his dying day Schmitt remained

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unrepentant about his collaboration." Publicly, yes; but not privately, as those who knew him can attest. Lilla presumes to know "Schmitt's deeper ambitions." But in this and other respects he presumes too much. He writes that there is "a remarkable lack of seriousness among those studying and promoting Schmitt today." He ought to take his job as a reviewer seriously.

G. L. Ulmen

To: Robert B. Silvers, T*he New York Review of Books*

As someone who published an intellectual biography of Carl Schmitt conspicuously ignored by Mark Lilla, I feel under some obligation to call attention to the inaccuracies in his review essay. Neither George Schwab, who is an active participant in American Jewish life, nor those of us in the US who have been influenced by his studies, minimizes Schmitt's anti-Semitic statements. We do argue nonetheless that there is no precedent for such outbursts before Hitler's accession to power, that Schmitt's editorializing about Jews in the thirties never included Nazi racism, and that given his many Jewish connections during the Weimar period and his sudden anti-Semitic conversion, Nazi ideologues specifically accused Schmitt of opportunism. As Schwab has documented and Lilla admits, from 1934 on Schmitt remained under SS surveillance, as an untrustworthy member of the Nazi Party. His anti-Semitic remarks at a conference called to expose Jewish jurisprudence in 1936 and in *The Leviathan in the State Theory of Thomas Hobbes* (1938) must be read in light of these circumstances. Schmitt's often quirky postwar observations in the *Glossarium* do not provide the definitive proof, with due respect to Heinrich Meier, of any lifelong obsession with the Jewish threat to Christian society. It reveals the bitterness of an aging former celebrity kept from returning to the university because of what he believed were the attacks launched against him by erstwhile Jewish students and friends. (The accusation was partly true but also ignored Schmitt's own bad behavior after 1933).

Lilla is entitled to his opinions, but his description of Meier's "musical" reading of Schmitt is a bit much. Note that his judgment may be less than disinterested scholarship. As director of the Friedrich von Siemens Stiftung in Munich, Meier has lavished on neoconservatives and Straussians in the US both trips and entertainment. Many of Lilla's friends have enjoyed Meier's *Gemütlichkeit*, and these festive gifts may explain some of the warmth of Lilla's tribute.

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Meier's interpretative work nonetheless abounds in rash generalizations. For example, Schmitt does not endorse, for existential, fatalistic, or any other murky reasons, wars of annihilation waged by one self-identified group against another. In *The Concept of the Political,* he presents friend-enemy distinctions as a recurrent defining feature of the "political," which is associated with intense conflict. But the author also praises the European state system there and in *Der Nomos der Erde* (1950) for placing legal and institutional restraints on collective enmities. His own jurists of choice included Grotius and Emmerich Vattel, thinkers who had reduced political conflict to legally neutral concepts and negotiable differences. Most of all, Schmitt feared ideological struggles fought as holy wars against dehumanized enemies.

Meier creates confusion by grafting Schmitt's anti-Semitic comments of the thirties and assorted, decontextualized splenetics out of the *Glossarium* on to texts written during the Weimar period. We are led to believe that the "enemy" featured in *The Concept of the Political* is the "Jew" as described by Schmitt in 1936 or else Jewish detractors whom he went after in the *Glossarium*. Meier is furthermore fixated on Schmitt's supposed glorification of Michael Bakunin, the Russian anarchist, who is made to prefigure a Schmittian cult of redemptive violence. But Schmitt's only favorable reference to Bakunin, in *Political Theology* (1921), is an extremely qualified compliment. He commends Bakunin for political-theological consistency (or, more accurately, he seems to agree with the Spanish counterrevolutionary Juan Donoso-Cortès, who is responsible for this praise). Though a useful conversation piece, this reference to Bakunin does not go far to substantiate Meier's interpretation of Schmitt.

Lilla depicts himself as the defender of an unchanging liberal tradition under siege by the same forces for centuries: "For nearly two centuries now, the advocates of liberal ideas have found themselves confronted by opponents like Carl Schmitt." Contrary to what Lilla suggests, Schmitt was not a dogged opponent of democratic revolutions; and from his work of 1921, *Die Diktatur*, down to *Legalität und Legitimität* (1932) Schmitt held up the Jacobins and Rousseau as democrats who understood the need for legitimating popular government. What Schmitt targeted was a form of nineteenth-century *bourgeois* liberalism, which tried to imprison the once sovereign state in rigid legal structures. It also denied the need for personal authority and taught that economic and legal activities would soon make the state obsolete. By "liberal," Schmitt was also referring to an apolitical attitude toward life and the defense of the private against the public sphere — characteristics he thought were inherent in the bourgeois worldview.

This worldview seemed to him not only prosaic but ultimately destructive. It ignored the crisis that inevitably overshadows the norm and the probability that new enmities would require organized resistance. Whether or not one agrees with this, it is doubtful that Schmitt was castigating what today goes by the name "liberal." The modern managerial state, which controls a vast public sector, aspires

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to socialize the family and has criminalized "insensitive" speech throughout Western European countries, is not the frail, decentralized regime which Schmitt had in mind. There is also no easy fit between nineteenth-century "liberal" middle class culture and the world of Mark Lilla, consisting of a yuppie society and expanding public administration. The liberal essence has changed dramatically since the Victorian age, and even more since the eighteenth century.

As for why some of us have written on Schmitt, it is not because of a "violent distaste for liberal society" or because "we long passionately for a new dispensation." My own interest was prompted by the weakening and disintegration of bourgeois liberal societies. I became preoccupied with how these societies were coopted by mass democracy, public administration, and the values of intellectuals. Schmitt dealt with that phenomenon historically if not always objectively. I was also struck by the applicability of his "concept of the political" for understanding the global managerial order that is now taking shape. Schmitt wrote extensively on the continuing dream of a world-state. If it were actualized, he insisted, it would obliterate cultural distinctions while demonizing anything that stood in its way.

While my bourgeois liberal sentiments are those of some European Schmittians, most notably Gianfranco Miglio, they are clearly not those of other American interpreters of Schmitt. Schwab and Ulmen were Cold War modern liberals, much like Lilla; and Schwab remains vocally committed to an American mission of spreading human rights and to an activist foreign policy. Schmitt's first American biographer, Joseph Bendersky, is an engaged multiculturalist, who is passionately, and perhaps even obsessively, concerned about racism and anti-Semitism in contemporary America. Bendersky, by the way, has written compellingly in *Telos* on the illusion that Lilla continues to foster — that American Schmittians form a united political front. If Lilla thinks he can find an anti-liberal pattern among them, he is free to look. What I perceive are varying interests among politically diverse scholars who have studied a long-lived and prolific thinker.

Paul Gottfried

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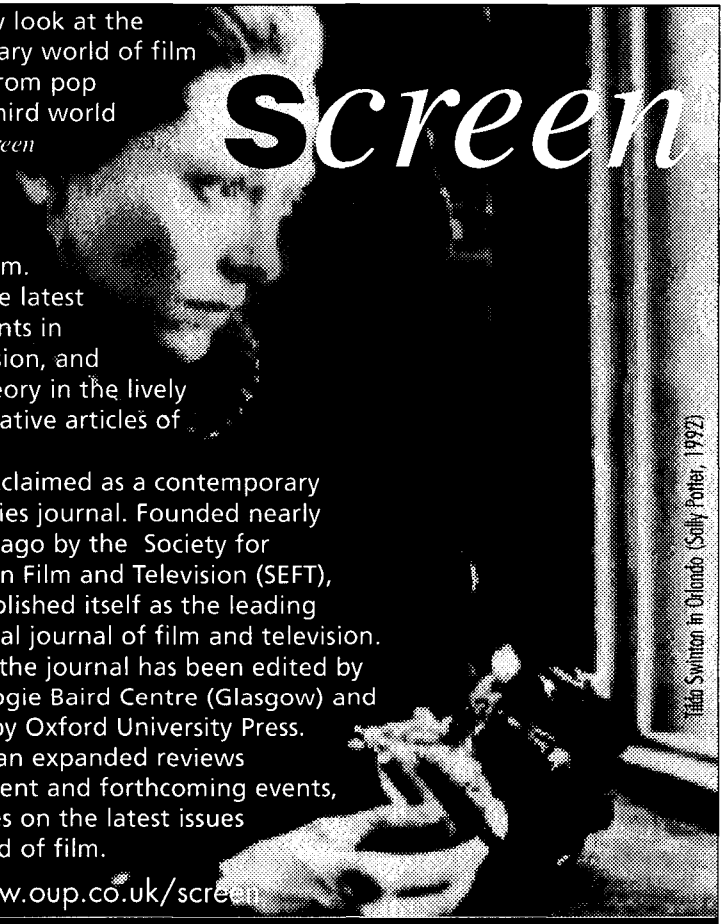

Tilda Swinton in Orlando (Sally Potter, 1992)

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Reviews:

Just Wars or Just Enemies?

Carl Schmitt, *Das international-rechtliche Verbrechen des Angriffskrieges und der Grundsatz "Nullum crimen, nulla poena sine lege,"* ed. with Notes and an Epilogue by Helmut Quaritsch (Berlin: Duncker & Humblot, 1994), 259 pp.

Just and Unjust Wars

The attempt to distinguish between just and unjust wars began after WWI. At the close of the 20th century, however, this distinction is still unclear. Despite efforts by the League of Nations and the UN, no new international law has been found to replace the *nomos* of the earth grounded in the *ius publicum Europaeum* that collapsed at the end of the 19th century.[1] Consequently, today aggressive wars are systematically being criminalized. Thus, in *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977),[2] Michael Walzer writes: "Aggression is the name we give to the crime of war" (p. 51) and attempts to revive the theory of just wars defined as limited wars. According to Walzer, "their conduct is governed by a set of rules designed to bar, so far as possible, the use of violence and coercion against noncombatant populations" (p. xvii). Allegedly, most wars are "just on one side (the side that fights in self-defense); and then some acts of war must also be justifiable" (p. xii). In this view, the only "just" recourse to war is to combat aggression. Apparently, oil reserves, lines of communication, freedom of waterways and all other past concerns are all out of bounds for Walzer. The only thing that matters is aggression, which refers to whoever fires the first shot or invades a foreign territory.

Walzer claims he always refers to "the laws of international society (as these

1. Within such a confused context, it is not surprising that, disregarding the turn from limited to total war that occurred in WWI, scholars such as Barbara Ehrenreich can still argue both that the passion of war causes combatants to dehumanize the enemy *and* that the warrior sees himself in the enemy and thus treats him as a true combatant — seemingly unaware of the contradiction. See Barbara Ehrenreich, *Blood Rites: Origins and History of the Passions of War* (New York: Henry Holt, 1997). While acknowledging that there is no substitute for an international order, another recent book continues to assume that nation-states are the only political units able to maintain such an order. See Philippe Delmas, *The Rosy Future of War* (New York: Free Press, 1997).

2. 2nd ed., with a new preface (New York: Basic Books, 1992).

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appear in legal handbooks and military manuals) as *positive* laws," but for the rest, he says: "when I talk of law I am referring to the moral law, to those general principles that we commonly acknowledge, even when we can't or won't live up to them" (p. xxvii). His objective is "to recapture the just war for political and moral theory. My own work, then, looks back to that religious tradition within which Western politics and morality were first given shape, to the books of writers like Maimonides, Aquinas, Vitoria, and Suarez — and then to the books of writers like Hugo Grotius, who took over that tradition and began to work it into secular form" (p. xxviii). The self-righteousness is all the more obvious in many of Walzer's outrageous claims, such as that the American war in Vietnam was a war of aggression similar to the Nazi conquests of WWII and the Soviet invasions of Hungary and Czechoslovakia (p. 292). His absolute morality necessitates a deliberate fogging of history and fudging of law whenever and wherever it is convenient. It also necessitates blurring the lines between internal and external, private and public — all in the name of the ordinary citizen: "My own task is different. I want to account for the ways in which men and women who are not lawyers but simply citizens (and sometimes soldiers) argue about war" (p. xvii). Here he succeeds, for his discussion of this complex issue is as confused as that of any ordinary citizen dealing with the subject.

The scope of the problem is evident in a recent symposium on Walzer's book.[3] As David C. Hendrickson puts it, if "war belongs to the realm of necessity, it makes no sense to pass moral judgment on it than it would to pass moral judgment on catastrophes occurring in nature."[4] Hendrickson focuses on the "legalist paradigm," i.e., what Walzer calls "the fundamental structure for our moral comprehension of war" — to intervene in the internal affairs of other states violates their rights and any "use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act." All the issues raised by Walzer's legalist paradigm have been raised anew in the past 20 years and particularly since the end of the Cold War — first and foremost in the case of "humanitarian" interventions. As Hendrickson notes, the latter has reversed the traditional ideological fault lines: "the Right is skeptical of assuming responsibility; the Left now wishes to take up the white man's burden. Walzer's rethinking of this issue is itself symbolic of this broader transformation. Whereas previously he had sought to justify a right of humanitarian intervention, he now speaks of an imperative duty."[5] Whereas earlier Walzer worried about Western neocolonialism,

3. This work has been extraordinarily influential. According to Michael Joseph Smith: "Since its appearance the book has been a standard text at universities throughout the world — as well as at military academies including West Point — where students have been introduced to its 'moral arguments with historical illustrations' about war in the relations among states." See "Twenty Years of Michael Walzer's *Just and Unjust Wars*," in *Ethics and International Affairs*, Vol. II (1997), p. 3.

4. *Ibid.*, pp. 19-20.

5. *Ibid.*, p. 27 and pp. 105-150.

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now, in the name of humanitarian intervention, he argues that: "Old and well-earned suspicions of American power must give way to a wary recognition of its necessity."[6] This indicates the ideological direction of Walzer's moral compass.[7]

The question of just and unjust wars has to do with the search for a new international order grounded in international law. Such an order cannot be grounded on any naive "moral law," but on precisely that tradition to which Walzer appeals but then transforms and trivializes. This Western tradition provides the only precedent for a serious consideration of these issues, and it is this tradition to which Carl Schmitt appealed when, in the summer of 1945, in war-ravaged Berlin, he wrote a comprehensive legal opinion (hereafter: *Gutachten*) concerning the criminality of aggressive war and the possibility of indicting industrialists as well as military and political leaders. It remained unpublished and largely unknown for more than 50 years until Helmut Quaritsch retrieved it from Schmitt's estate. Its significance transcends its immediate purpose because it addresses the question of the reconstitution of international law. Thus Quaritsch is justified in locating Schmitt's *Gutachten* in the history of "aggressive wars" from the Nuremberg and Tokyo trials to recent UN deliberations concerning the war in the Balkans.

The Criminalization of Aggression

In the eyes of their participants, the Nuremberg and Tokyo trials were supposed to constitute "a landmark in law," comparable to the Magna Carta, Habeas Corpus and the Bill of Rights (p. 158). In the end, however, they succeeded only in constituting "victors' justice," as indicated by the British representative to the trial: "What we want to abolish at the trial is a discussion as to whether the acts are violations of international law or not. We declare what the international law is so there won't be any discussions on whether it is international law or not" (p. 170). The UN General Assembly adopted the "Principles of International Law" contained in the London Charter and in the judgments of the International Military Tribunal at Nuremberg. While those principles can be considered the *opinio iuris* of the international community, half a century after

6. Michael Walzer, "The Politics of Rescue," in *Dissent* (Winter 1995), pp. 35-41, quoted by Hendrickson, *op. cit.*, p. 28.

7. See also Joseph Boyle, "*Just and Unjust Wars*: Casuistry and the Boundaries of the Moral World," in "Twenty Years . . . ," *op. cit.*, pp. 83-98. The relevance of Schmitt's distinction between moral and theological questions, on the one hand, juridical and political ones, on the other, is obvious when the moral and theological approach is secularized and becomes moral and ideological, as it does in Waltzer. This Left-liberal approach pretends to be objectively moral, but its ideological agenda is alway prominent. See, e.g., P. N. Fedoseev, "The Conception of Just and Unjust Wars," in Howard L. Parsons and John Somerville, eds., *Marxism, Revolution and Peace: From the Proceedings of the Society for the Philosophical Study of Dialectical Materialism* (Amsterdam: B. R. Grüner B. V., 1977), pp. 67-74. In articulating the Soviet position, Fedoseev argues that the only "just wars" are "wars of liberation"; all others are "unjust and aggressive." This is why "Marxists consider the division of wars into just and unjust wars fully substantiated."

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the Nuremberg and Tokyo trials it is obvious that they constituted no landmark in international law.[8] Both trials were unique, at least with respect to crimes against peace and in terms of Schmitt's argument in his *Gutachten* concerning the criminalization of aggression.

Schmitt traced the origin of the modern criminalization of aggression to a letter dated December 14, 1910 by Andrew Carnegie to the Trustee of the Carnegie Foundation in which he announced the transfer of 10 million dollars in secured bonds to be used "to destroy war, this blemish on civilization." Carnegie continued: "Certainly we no longer gorge ourselves, we no longer torture our prisoners, we no longer plunder cities and destroy their inhabitants, but like barbarians, we still make war. In the 20th century of the Christian era one can only excuse wild animals, because war is essentially criminal, and not only aggressive war." Schmitt asks rhetorically: "Why is it essentially criminal?" Because it is not law but power which decides the outcome. It is a crime only if a people rejects the proceedings of the international court.

The spokesman for the "American movement" to outlaw war was James T. Shotwell,"[9] who in March 1927 delivered a lecture in Germany titled: "Do we

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8. Quaritsch quotes Eugene Davidson concerning the history of war from 1950 to 1970: "No statesman can possibly act intelligently if he relies on the presumed validity of the findings of Nuremberg, on the concept of one world, on the promise of a universal collective security. These principles have little more than a faint propaganda value and no state can live by them or expect that any other state will live by them." See Eugene Davidson, *The Nuremberg Fallacy: Wars and War Crimes since World War II* (New York: Macmillan, 1973). See also Eugene Davidson, *The Trial of the Germans: An Account of the Twenty-two Defendants Before the International Military Tribunal at Nuremberg* [1966] (Columbia, MO: University of Missouri Press, 1997).

9. James T. Shotwell (1874-1965) had been an advisor to President Woodrow Wilson, a member of the US delegation to the Paris Peace Conference at Versailles, and eventualy became an advisor to the US delegation at the founding of the UN in San Francisco. In the spring of 1927, Shotwell was appointed professor of international relations at the newly founded Hochschule für Politik in Berlin. His inaugural lecture on the occasion of the establishment of a chair funded by the Carnegie Foundation was delivered in German on March 1. Shotwell summarizes his speech in Chapter 12, "The Briand Offer," of *The Autobiography of James T. Shotwell* (Indianapolis and New York: Bobbs-Merrill, 1961), pp. 201-203. Among other things, Shotwell says he advocated a "world Locarno," calling for a universal pledge of peace. See James Thomson Shotwell, *War as an Instrument of National Policy, and its Renunciation in the Pact of Paris* (1929), with a new introduction by Gerald E. Markowitz (New York: Garland Publishers, 1974). Since, as Shotwell reports, his lecture was widely publicized in Germany, "but with little support for its central thesis," it caught Schmitt's attention, not the least because Schmitt first introduced his friend-enemy thesis in a lecture at the same Hochschule für Politik in May 1927. But since Schmitt did not turn his attention to the study of war until the 1930s, it appears from his comments that he only read Shotwell's lecture later. Schmitt called this lecture "one of the most critical and fateful lectures for Germany" because it signaled the "formal introduction" of the new concept of war and the criminalization of the aggressor. See Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947- 1951*, Eberhard Freiherr von Medem, ed. (Berlin: Duncker & Humblot, 1991), (August 31, 1947), p. 6.

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Stand at a Turning Point in World History?" Schmitt paraphrases Shotwell's argument and makes a counter-argument: "Earlier the world was static and there was war, now it becomes dynamic and there should be peace; remarkable; rage and a bad conscience seek a culprit and a scapegoat. . . . That is also part of the dynamism of this new age." Shotwell asked: "What is the result?" The answer: since war has ceased to be calculable, its political realism is obsolete and we must develop a political realism of peace (the League of Nations, international justice, Locarno). Schmitt's response does not play with the logical absurdity of Shotwell's argument but treats it seriously: since "war has ceased to be calculable, it need not cease to exist. The fact that war no longer has to do with political realism could also have the result that, since its form and content have changed, so has the meaning of political realism, and that this politics is no longer merely an 'art of the possible,' as in the 19th century. It could be that, precisely because of . . . the consciousness of the enormous turning point and dynamic character of the present, precisely because of the consciousness of the incalculability of war, a new type of political realism has arisen which assumes this consciousness and does not fear to meet the opponent face to face because it knows that it has the right weapons."[10]

As in *Der Nomos der Erde,*[11] in his *Gutachten* Schmitt traces his critique of just wars back to scholastic theologians, especially Vitoria. The latter's thinking is rooted in the medieval order rather than in the modern international law of the *ius publicum Europaeum* — that post-medieval international law which sought to repress the "just cause" of war, grounded in ecclesiastical laws, and replace it with the "just enemy," grounded in inter-state laws, to end the indiscriminate wars of the Middle Ages. This juridical formalization of war between equally sovereign states led to the *limiting* of war. Crucial to this accomplishment was the definitive separation of theological and juridical arguments. With the end of the *ius publicum Europaeum,* war became once again an "offense" and the aggressor a "felon" in the most extreme criminal sense. Yet, as Schmitt put it, the injustice of the aggression lies not in the establishment of the cause of war but in the crime of aggression itself. This is why the modern distinction between just and unjust wars has nothing to do with scholastic doctrine or Vitoria.

In the winter semester 1944/45, when Schmitt turned his attention to the concept of war,[12] he was the only professor on the law faculty at the University

10. Schmitt, *Glossarium, ibid.* (September 1, 1947), p. 7.

11. See the translation of Chapter II of this work, "The Land Appropriation of a New World," which contains a long discussion of Vitoria, in this issue of *Telos*.

12. As Quaritsch notes, it is unclear whether Schmitt took parts II and III of his *Gutachten* out of his manuscript on *Der Nomos der Erde* (which he was writing during the war) or whether he inserted parts of his *Gutachten* into his *Nomos* manuscript. In any case, both contain sections dealing with "War Crimes and War Guilt in the Versailles Treaty" and "Development of the Penalization of Aggressive War in International Law." Quaritsch compares Schmitt's formulations in his *Gutachten* and in *Der Nomos der Erde*. See pp. 92, 101, 103, 104, 117, etc.

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of Berlin sill lecturing on public and international law. Schmitt's earlier discussion of war had culminated in his address to the Academy of German Law in Munich (October 29, 1937) on the turn to a discriminatory concept of war. In view of the bloody struggles that had broken out in various parts of the world after WWI, Schmitt said: "The anxiety of the present world situation is mirrored in the problematic of the concept of war. It demonstrates what has always been true — that the history of international law is a history of the concept of war. International law is clearly a 'law of war and peace,' *ius belli ac pacis*, and will remain so as long as it is a prerogative of independent peoples organized into states, i.e., as long as war obtains between states and it is not an international civil war. Every dissolution of old orders and every attempt to create new types of association raises this problem. Within one and the same order of international law there cannot be two antithetical concepts of war any more than two different concepts of neutrality."[13] The crises in Manchuria, Ethiopia, and Spain exemplified the new situation — a situation characterized by the attempt to combine the League of Nations with a universal economic order and the attempt to distinguish between just and unjust wars. Problems arose as soon as the claims of organized peoples came into conflict with the claims of a world economic order,[14] while the distinction between just and unjust wars had led to an even more "total" distinction between friend and enemy.[15]

Schmitt's Gutachten *in Perspective*

Following his active collaboration with the Nazi regime between 1933 and 1936,[16] Schmitt developed a critique of the Nazi system both in private conversations and in his seminar,[17] as well as in works such as *Leviathan*.[18] Thus, as Quaritsch indicates, what he describes as the crimes and character of the Nazi regime is not merely a camouflage for his own actions but his considered opinion. In fact,

13. Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (Munich: Duncker & Humblot, 1938), p. 1.

14. *Ibid.*, p. 6.

15. *Ibid.*, p. 50. See also pages 41 and 45. Cf. G. L. Ulmen, "The Return of the Foe" and George Schwab, "Enemy or Foe: A Conflict of Modern Politics" in *Telos* 72 (Summer 1987), pp. 187-193 and 194-201 respectively.

16. See Heinz Höhne, *Die Zeit der Illusionen: Hitler und die Anfänge des Dritten Reiches 1933-1936* (Düsseldorf and New York: ECON Verlag, 1991).

17. Schmitt criticized Hitler at the beginning of the Nazi regime, as reported by one of Schmitt's Jewish students, who was in Schmitt's seminar when Hitler took power in January 1933. In private conversations, Ludwig Lachmann has stated that Schmitt expressed his distress at the Nazi victory in his seminar in no uncertain term, which was consistent with Schmitt's warnings in 1932 against allowing any party unfriendly to the constitution the "equal chance" to compete for political power. See Carl Schmitt, *Legalität und Legitimität* (1932), 2nd ed. (Berlin: Duncker & Humblot, 1968).

18. See Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, Foreword and Introduction by George Schwab, tr. by George Schwab and Erna Hilfstein (Westport: Greenwood Press, 1996).

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Schmitt's *Gutachten* was written after Friedrich Flick, one of the most prominent industrialists in Weimar Germany, was arrested by the Americans on June 13, 1945. While incarcerated, Flick read in the American military newspaper *Stars and Stripes* an article by Simon Bougin titled "History's Greatest Case — Justice Jackson has Established a Formula for Trial of Germany's War Criminals," which included "Leaders of the German army and state, of industry and finance, and of the Gestapo and the SS." Flick also became aware of the so-called Jackson Report to President Truman of June 6, 1945, mentioned in both the American and the German press, which listed financial and industrial leaders — along with political and military leaders — as subject to criminal prosecution.[19] Thus, even before his arrest, Flick could have expected that charges of this nature could be brought against him, although it is unclear whether he personally asked Schmitt to write a *Gutachten,* or whether this was done by his lawyer, Walter Schmidt, or one of Flick's operatives. At any rate, as Quaritsch points out, Schmitt could not have begun work on it before the middle or end of June 1945.

Given the comprehensiveness of Schmitt's treatment, he completed his *Gutachten* in an amazingly short time, before he himself was arrested September 26, 1945.[20] Since the Nuremberg trial ruled against the principle of "*nullum crimen, nulla poena sine lege*" ("no crime, no penalty in law"), Schmitt's opinion was not used in the trial of Flick and his colleagues (April 19-Dec. 22, 1947). At any rate, it would have been beside the point, since they were not charged with aggressive war or crimes against peace. They were charged only with war crimes and crimes against humanity for the use of forced labor from concentration camps and of prisoners of war in their factories.[21] Schmitt had sharply distinguished between crimes against peace and crimes against humanity, and it was not known whether the latter could be brought against industrial and financial leaders. However, even if he had known, it is clear from his *Gutachten* that Schmitt would not have changed his argument. As Quaritsch notes, a legal opinion differs from a lawyer's brief because the jurist remains neutral. He is not representing the defendant

19. According to the June 12, 1945 issue of *Berliner Zeitung*, Jackson added: "We should not concede that the US position be couched in a sterile legalism, which developed during the age of imperialism, whereby the truth of aggressive wars was concealed in fine words. Through this trial we should be in a position to create a jurisdiction of reprisal which the civilized world can endeavor to grapple with in the future. . . ."

20. See Joseph W. Bendersky, "Carl Schmitt at Nuremberg," *op. cit.*, pp. 91-97; "Interrogation of Carl Schmitt by Robert Kempner (I-III)," pp. 97-107; and "On Großraum, the Hitler Regime and Collaboration (I-III)," pp. 107-130 in *Telos* 72 (Summer 1987)

21. Flick was convicted of employing the forced labor of more than 40,000 war prisoners and concentration camp inmates in his factories during WWII. He was sentenced to seven years in prison, but was released after serving only three years. He died in 1989 at the age of 89. His grandson, Gert-Rudolf Flick, who lives in London, recently attempted to fund a Chair for European Thought at Oxford University. The "Ethics Committee," however, rejected the offer because of the "unsavory origin" of the money. See "Flick zieht Spende für Oxford zurück," in *Süddeutsche Zeitung* (April 17, 1996).

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and his opinion may lead to results unforeseen or even unwanted by the defendant.

Schmitt's *Gutachten* fulfilled the assigned task. It addressed an international court and the authorities in Washington, London and Moscow. Its argument is consistent with his scholarly work on war, its relation to politics, its place in international law, its legal status as opposed to a criminal act. As he wrote during the Weimar Republic, neither war nor revolution is something ideal: "The military battle itself is not the 'continuation of politics by other means' . . . War has its own strategic, tactical, as well as other rules and viewpoints, but they all presuppose that the political decision has already been made as to who the enemy is. . . . War is neither the aim nor the purpose nor even the very content of politics. But as an ever present possibility it is the leading presupposition which determines in a characteristic way human action and thinking and thereby creates a specifically political behavior."[22] Clearly, given Schmitt's problems with the Nazi regime after 1936 and his turn from constitutional to international law, his focus had broadened, as can be seen in his treatise on *Großraum*.[23] Moreover, his treatise on the turn to a discriminatory concept of war[24] already juridically predisposed him to argue against the criminalization of aggressive war as well as against the revival of the concept "just war," which he expounds so eloquently in *Der Nomos der Erde*. In his postwar diary, he wrote: "The criminalization of aggressive war must continually issue in ever new criminalizations. . . . I would have died willingly had my August 1945 discussion of the criminalization of aggressive war been published then or during the trials."[25]

Three Types of "War Crimes"

Schmitt's initial distinction in the *Gutachten*[26] between three types of "war crimes" is crucial. "War laws" (*ius in bello*) refer to violations of the rules and uses of war by the military personnel of a belligerent state, as stipulated by the Hague Convention and the like. Before 1914, this was the general meaning of "war crimes," which presupposed that war itself is a legal undertaking with specific rules of combat. Such rules were long known and accepted in the literature

22. Carl Schmitt, *The Concept of the Political*, tr. with an Introduction by George Schwab (Chicago: The University of Chicago Press, 1996), p. 34.

23. Carl Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte* [1941] (Berlin: Duncker & Humblot, 1991). See also Mathias Schmoeckel, *Die Großrauntheorie: Ein Beitrag zur Geschichte der Völkerrechtswissenschaft im Dritten Reich, insbesondere der Kriegszeit* (Berlin: Duncker & Humblot, 1994).

24. Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff*, *op. cit.*

25. Carl Schmitt, *Glossarium*, *op. cit.* (June 6, 1948), p. 167.

26. The *Gutachten* is divided into five sections and a conclusion: "The Practical Significance of the Principle *nullum crimen, nulla poena sine lege*"; "War Crimes and War Guilt in the Versailles Treaty"; "Development of the Penalization of Aggressive War in International Law 1919-1939"; "Principles and Accessories to the International Crime of Aggressive War"; and "The Situation of the Individual Citizen, in Particular the Economically Active Ordinary Businessman."

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on international and criminal laws, as well as military instructions of warring states. The criminalization of "aggressive war," however, made war itself a crime. As Schmitt noted, this is new in traditional international and criminal law. In traditional international law, every sovereign state had a recognized right to war (*ius ad bellum)*, which precluded the need to distinguish between "aggressive" and "defensive" war. The criminalization of aggressive war in international law came about only after WWI and the Versailles treaty. Between 1920 and 1939, the League of Nations sought to outlaw war, particularly by means of the Geneva Protocol of October 2, 1924 and the Kellogg-Briand Pact of August 27, 1928. The question for Schmitt was whether "aggressive war" was already a recognized statutory crime in international law in the summer of 1939. If it was still only a moral postulate and a program requiring further clarification, then the *nullum crimen* principle was still binding.[27]

As Schmitt pointed out, the principle of *nullum crimen* is understood and applied differently in continental Europe, England and the US. In continental thinking the word *lex* in the formula *sine lege* refers to written law. This has been the case for two centuries. Following the French paradigm, this written law is also codified. Thus the *nullum crimen* principle in continental thinking contains a three-part prohibition: it excludes not only criminal charges after the fact but also the intensified criminalization of common law and, by analogy, also of criminal law. English law also rejects *ex post facto* penalties. In fact, the *nullum crimen* principle is of English origin. It stems from common law and is part of due process. The difference between English and continental law, however, is fundamental, because English law is unwritten common law and thus regards *precedent* as decisive. What is new in English law is always and only a matter of the

27. In his postwar diary, Schmitt commented on Wilhelm Grewe's book, *Nürnberg als Rechtsfrage: Eine Diskussion* (Stuttgart: Otto Küster, 1947): "I have quickly read the Grewe-Küster discussion. . . . I am certain that Grewe is familiar with my juridical opinion of Summer 1945 (concerning aggressive war in international law and the principle *nullum crimen sine lege*). Küster sometimes appears so unsympathetic and Grewe so cautious, but there is still much that is visible, and not only with respect to real juridical questions and arguments but also something much more important. This discussion shows how we in Germany are at the core of the modern problematic and we must come to terms with this terrible problematic in ourselves and with ourselves, without the help of the East or the West." "(To Wilhelm Grewe): Concerning discussion of Nuremberg as a legal question and your covering letter. . . . I consider it a great and decisive methodological accomplishment that you separated the question of the criminalization of aggressive war as such from the question of other crimes (atrocities and war crimes) and consciously raised this separation to a principle (p. 99). Without this distinction, there can be no scholarly discussion of the process either in part or in whole, also no juridical concept of this new and difficult crime of aggressive war, with all the new problems of presentation of the facts of the case, the circle of perpetrators, the relation between dubious definitions of aggression and the objective problem of war guilt, as well as the '*iusta causa belli*'." See Schmitt, *Glossarium*, *op. cit* (March 14, 1948), pp. 114-15 and (April 3, 1948), pp. 135-36.

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disclosure of what is already there — what is implicit. Although conditioned by English and continental law, American law is different: it is aware of the contradiction between written and moral law and excludes *ex post facto* laws. Unlike English law, in American law there is a sharp sense of the newness of a crime. Thus there is a joining of moral and juridical viewpoints, which means that American jurists are less bound by the *nullum crimen* principle.

Schmitt's analysis of the *nullum crimen* principle is not only part of his argument against the criminalization of aggressive war but also crucial to his identification of a third type of "war crimes." Since his treatment of this type of crimes may be considered his personal *mea culpa* for having collaborated with the Nazis,[28] it has implications beyond its immediate objectives. This is what Schmitt writes about these crimes: "These are atrocities in a specific sense — systematic killings and inhuman cruelties, whose victims were unarmed civilians. They are not military actions but rather have a specific relation to the 1939 war because they were begun either prior to or during this war and are typical expressions of a particularly inhuman mentality which ultimately culminated in the 1939 world war. The brutality and bestiality of these monstrous crimes exceed the normal human power of comprehension. They are components and manifestations of a frightful '*scelus infandum*' in the fullest sense of this term.[29] They are beyond the scope of all traditional and customary measures of international and criminal law. Such crimes set the perpetrators outside the law and make them outlaws in the fullest sense. The order of a superior authority cannot justify or excuse such monstrous crimes; it can at best, in a particular situation, raise the question of whether the perpetrator found himself in a critical situation and whether this distress excuses him. In no case should the abnormality of the crime be made the object of discussion, thereby deflecting the monstrousness of these transgressions and diminishing the awareness of their abnormality" (p. 16).[30]

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28. See George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936*, 2nd ed. with a New Introduction (New York: Greenwood Press, 1989), Part Two.

29. As Quaritsch notes, Schmitt's concept of *scelus infandum* can be found in classical Latin, but only as an occasional word conjunction. *Scelus* signifies a nefarious act, such as murder and high treason, whereas *infandus* in this connection is translatable as abominable or unspeakable. Schmitt gives the phrase his own interpretation.

30. In his elaboration of the *nullum crimen* principle, Schmitt goes to the heart of the matter: "Atrocities in a specific sense, such as obtained before and during the last world war, must in fact be considered '*mala in se*.' Their inhumanity is so great and so evident that it is sufficient to establish the facts and the perpetrators without the need to prove guilt by reference to prior positive criminal laws. . . Here also, it is not necessary to question the extent to which the perpetrator had a criminal intent. Everyone understands this as self-evident. In view of such offenses, anyone wanting to raise the objection of '*nullum crimen*' and to refer to prior positive provisions of criminal law would immediately place himself in a precarious position" (p. 23).

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At the conclusion of his *Gutachten*, Schmitt added a note in English, reiterating his condemnation of the Nazi regime: "It goes without saying that — at the end of WWII — mankind is obliged to pass a sentence on Hitler's and his accomplices' *scelus infandum*" (p. 80).[31] In the same way Europe found a way to condemn Napoleon's crimes after his 1815 defeat, it must now find a way to condemn Hitler's much greater crimes, because his "*scelus infandum* and especially the monstrous atrocities of the SS and the Gestapo cannot be classified in their real essence by the rules and categories of the usual positive law, neithr with the help of the old municipal criminal or constitutional law, nor with the help of the present international law, that has its origin in the *ius publicum Europaeum*, i.e., relations between Christian sovereigns of Europe from the sixteenth to the nineteenth century" (p. 81). Schmitt concludes that a *scelus infandum* must never become a legal precedent.

The Legal Situation of Ordinary Citizens during War

Only after having made his case so unequivocally could Schmitt proceed to argue against the criminalization of aggressive war and the applicability of the *nullum crimen* principle to ordinary citizens — in particular, to the predicament of an "economically active, ordinary businessman." Of course, there would seem to be a wide disparity between ordinary citizens, even ordinary businessmen, and the industrial leaders of Nazi Germany. From the standpoint of international law, this disparity was not an issue. Schmitt was basing himself on the international law in force up to when the war began. As he points out, the war guilt clause in the Versailles Treaty clashes with previous international concepts of war. In addition, it does not mention a general criminalization of aggressive war but only of war as a moral crime against humanity, of which only the head of state of the Central Powers was guilty. Moreover, this clause did not appear under "Penalties" but rather "Reparations," which meant that it was considered more from an economic than from a criminal standpoint. In fact, the whole question of war guilt since 1919 had been dealt with only in connection with the question of reparations.

During the interwar period, there was an attempt to establish a new international order. It received its greatest impetus from Woodrow Wilson and the American decision not to ratify the Versailles treaty or join the League of Nations. Yet the US continued to play a significant and in some respects decisive role in Europe: it was privately present and publicly absent. This ambiguity was based on the dialectic of American foreign policy or what Schmitt characterized as the presumed separation between economics and politics.[32] Moreover,

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31. There is no text of the *Gutachten* in Schmitt's handwriting. He dictated it to his secretary, the late Anni Stand, and then corrected the manuscript. But he did write both the introduction and the English note. The quoted passages have been modified.

32. See G. L. Ulmen, "American Imperialism and International Law: Carl Schmitt on the US in World Affairs," in *Telos* 72 (Summer 1987), pp. 43-73.

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the attempt to set an international penalty for aggressive war ran into a series of difficulties, which must have appeared unresolvable to ordinary citizens — such as the antithesis between moral and legal thinking, as well as between moral and legal responsibilities in the conflict between economic and political problems. At any rate, the dilemma between a juridical solution to outlawing war, such as obtained in the 1924 Geneva Protocol, and a political solution to the causes of war, such as rearmament and security, increased as time went on. Then too, there was the problem of whether war is a *political* or a *general* crime. Thus it was not difficult for continental jurists to conclude that, because of its lack of definitions, sanctions and organization, its reservations and its relation to the League of Nations and, finally, its use of public opinion as its essential sanction, the Kellogg Pact had no legal foundation for criminal prosecution of a new crime. According to Schmitt, this is precisely where agreement with American jurists was extraordinarily difficult. This is where all the above mentioned antitheses came to the fore. The American jurists' arguments remained the same, namely that the Kellogg Pact bound all states and peoples to a universal conviction that aggressive war is a crime and that Hitler and his henchmen had begun such a war. For those advocating this outlawing of aggressive war, the crime of war was comparable to piracy.

Schmitt's argument is coherent. In international law, the state is the only subject. This is consistent with the fundamental distinction between domestic and foreign. But for those seeking to outlaw war, the sharp juridical distinction between state and individual, international and domestic law, were only technical details. As soon as the question ceased to be merely technical and became moral (as in a modern world war), the relation between the state and the individual became critical and easily degenerated into moral, ideological or even religious discussions. American authors insisted that only a human being can have rights and duties. This, of course, raised the issue of ordinary citizens' responsibility.[33]

In this connection, Schmitt points out that the prevailing view everywhere is that ordinary citizens must remain loyal to their national government and have a duty to defend it in wartime. The state — not the individual — decides whether a war is just or unjust. Here again, Schmitt is careful to reiterate that he is not speaking of individuals who participate in atrocities but only of international war crimes. The assumption that in wartime a citizen's loyalty is to his country is also part of scholastic natural law. Not only had this medieval doctrine been used for centuries, but recently it had been reiterated by a leading American jurist, James Brown Scott, who had written extensively on Vitoria and

33. Schmitt does not defend or excuse any of the officials in the Hitler regime, but he does raise the question of access to Hitler. See Carl Schmitt, "Der Zugang zum Macht, ein zentrales verfassungsrechtliches Problem" (1947), in Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954: Materialien zu einer Verfassungslehre*(1958), 2nd ed. (Berlin: Duncker & Humblot, 1973), pp. 430-439.

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Suarez. At the Paris Peace Conference, Scott was prominent in discussions concerning criminal proceedings against Wilhelm II. He appealed to the doctrine of a just war. Given Scott's extraordinary influence, Schmitt thought something should be said about the revival of the scholastic doctrine of a just war.[34] Specifically, he wrote: "If one compares the concrete situation and presuppositions of the scholastic doctrine with the contemporary situation, then the salient point is immediately recognizable. It is not possible to postulate a situation in international law where the individual citizen is forced to oppose his own country and government in wartime so long as there are no international institutions which could give the individual a hearing and protection" (p. 73). Thus, it is legally impossible for individual citizens to decide on the justice or injustice of a war conducted by their own country.

Schmitt points out that previously the organization of criminal justice had a purely domestic scope. Criminal laws, procedures and courts were national matters. Were such exclusively national and domestic institutions to be transposed to the international sphere, the legal position of individual citizens would be fundamentally altered. Actions previously required to fulfill a domestic duty would become crimes, and actions previously considered domestic crimes, such as high treason, resistance and sabotage, would become international duties whose nonfulfillment would turn loyal citizens into international criminals. Thus there would be a conflict of duties, which would plunge ordinary citizens in a state of anxiety only conceivable in the most frightful civil wars.

A Legal Opinion for Posterity

Despite the fact that Schmitt's *Gutachten* was not used or published during the Nuremberg trial, Quaritsch rightly regards it as a legal opinion for posterity. Not only is it an integral part of Schmitt's biography, but it is also crucial for an understanding of war and politics in an increasingly globalized situation in which moral and theological arguments are again coming to the fore — a situation without any grounding in international law. The 20th century of "total war" has demonstrated the civilizing and even "rational" policy of Eurocentric international law grounded in the *ius publicum Europaeum* — the substitution of the concept of the "just enemy" for that of a "just war" and the related "bracketing of war," whereby it became possible to have truly "limited" wars. Consequently, the need for a new *nomos* of the earth is becoming increasingly obvious.

34. In his postwar diary, Schmitt wrote: "Yesterday evening I again read Fr. de Vitoria and became reacquainted with the terrible misuse of his doctrine of a just war, especially the 5 *dubi circa iustutiam belli* and the 9 *dubiosa quantum liceat in bello iusto*. Whoever speaks of a just war and does not indicate the practical, moral and historical significance all these *dubia* and *dubiosa* have for him has no authority on his side"; "Given my previous experiences, from a scholarly viewpoint I can say that 9/10 of everything written about Vitoria today is a shameless swindle, unadulterated rubbish and only the most pathetic fellow-traveling." See Schmitt, *Glossarium*, *op. cit.* (June 29, 1948), p. 172 and 173.

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Neither the UN nor globalization has eliminated the need for a law of war and peace. As Schmitt wrote during the Weimar Republic: "It is irrelevant here whether one rejects, accepts, or perhaps finds it an atavistic remnant of barbaric times that nations continue to group themselves according to friend and enemy, or hopes that the antithesis will one day vanish from the world, or whether it is perhaps sound pedagogic reasoning to imagine that enemies no longer exist. The concern here is neither with abstractions nor with normative ideals, but with inherent reality and the real possibility of such a distinction. One may or may not share these hopes and pedagogic ideals. But, rationally speaking, it cannot be denied that nations continue to group themselves according to the friend-enemy antithesis, that the distinction still remains relevant today, and that this is an ever present possibility for every people existing in the political sphere."[35] Since the traditional state is historically obsolete and new political forms will have to emerge in the 21st century, people will continue to organize themselves in one dominant or several types of collectivities (*Großäume*, regions, or collectivities yet undefined) and, as Schmitt observed: "An enemy exists only when, at least potentially, one fighting collectivity of people confronts a similar collectivity. The enemy is solely the public enemy, because everything that has a relationship to such a collectivity of men, particularly to a whole nation, becomes public by virtue of such a relationship."[36] From the Middle Ages to the present, from Vitoria to Schmitt, the logic of international law has been that just wars are total wars which transform the *iustus hostis* into a *perfidus hostis*.

Once war ceases to be a means of rational politics, it becomes a means of ideological (or religious, moral, ethnic, etc.) domination. Once war ceases to be a public contest between recognized political entities, it becomes what Schmitt called an "international civil war."[37] Clearly, the dissolution of old orders and the desire for new types of political collectivities has raised again the central question of international law — the concept of war. How this question is answered will determine peace and stability in the 21st century.

Gary Ulmen

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35. Schmitt, *The Concept of the Political*, *op. cit.*, p. 28 (translation modified).
36. *Ibid.*
37. Rather than arguing for the reconstitution of international law or even recognizing the relation between the concept of war and international law, Samuel P. Huntington simply accepts the worst case scenario. Despite the title of his book, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Shuster, 1996), he clearly has no concept of the "remaking of world order" beyond what he calls the "*abstention rule*" — that "core" states "abstain from intervention in conflicts in other civilizations" — and the "*joint mediation rule*" — that "core states negotiate with each other to contain or to halt fault line wars between states or groups from their civilizations" (p. 316).

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Catholicism as a Paradigm of the Political?

Carl Schmitt, *Roman Catholicism and Political Form*, tr. by G. L. Ulmen (Westport, CT: Greenwood Press, 1996), 68+xxxvi pp.

It was only subsequent to 1976 that an appreciable number of the writings that originally established Carl Schmitt's reputation in Weimar Germany as a major political theorist began to become available in English. But there was one of Schmitt's books from this Weimar period that did exist in an English translation for most of the many years during which Schmitt was a figure at the edge, or even beyond the edge, of the intellectual horizons of the public concerned with political theory in the US and other English-speaking countries. An English translation of *Römischer Katholizimus und Politische Form,* a book originally published in Germany in 1923, was published in 1931 under the title *The Necessity of Politics: An Essay on the Representative Idea in the Church and in Modern Europe.*[1] This book is now newly translated by G. L. Ulmen as *Roman Catholicism and Political Form* (RCAPF). When Ulmen asserts near the beginning of his "Introduction" (p. x) that some justification is needed to explain the reason for the book's translation — in fact, its retranslation — he implicitly poses the question of where this little book of Schmitt's — "a seemingly obscure essay," he calls it — fits in Schmitt's *oeuvre* as a whole. In the literature about Schmitt in English produced during the past fifteen years — "an explosion" it has been called[2] — *Römischer Katholizimus und Politische Form* does not figure prominently.[3] How it "fits in" has not

1. *The Necessity of Politics* was published in London by Sheed and Ward. It was accompanied by a lengthy introduction by Christopher Dawson, an introduction worth reading today, not so much for what it says about Schmitt's political theory, as for its analysis of the European crisis to which Schmitt's thought was a response. This translation was buried in obscurity, having attracted almost no attention from the audience for which it may be presumed that it was intended, Catholics in Britain and the United States, and less than that from the public concerned with political theory and philosophy. In 1988 this same translation of *Römischer Katholizimus und Politische Form*, "thoroughly revised" and with an introduction by Simona Draghici, was reissued under the title *The Idea of Representation* (Washington, DC: The Plutarch Press, 1988). Republication did nothing to rescue the English version of this essay from obscurity.

2. Tracy B. Strong in the "Forward" to the republication of *The Concept of the Political*, tr. by George Schwab (Chicago: University of Chicago Press, 1996), xii.

3. The very recent book by John P. McCormick, *Carl Schmitt's Critique of Liberalism* (Cambridge: Cambridge University Press, 1997) is an exception in this respect. Paul Gottfried, *Carl Schmitt: Politics and Theory* (Westport, Connecticut: Greenwood Press, 1990), also attempts to situate RCAPF.

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been clear. In his introduction Ulmen undertakes to make this clear.

Along with his translation of *Roman Catholicism and Political Form*, Ulmen includes a short piece Schmitt published in 1917, "The Visibility of the Church: A Scholastic Consideration" (VC). While one might be inclined to regard RCAPF and VC as "religious tracts," both of these essays belong to Schmitt's effort to think through the meaning of modernity. Ulmen makes the important point that, while *RCAPF* and VC "do not constitute a uniform argument," Schmitt's "1923 essay presupposes the theological argument in his 1917 essay" (pp. xi-xii). What is called "visibility" in the 1917 essay will be called "representation" in *RCAPF*. What Schmitt argues for in the 1917 essay is the visibility, or publicness, of the Church as a community existing in the world. "[N]o one is entitled to turn a subjective experience into the criterion of a proper Christian life" (VC, p. 49). That entails arguing against what Hegel had identified as "the distinctively Protestant principle . . . now the principle universally admitted, to hold fast to interiority as such, rejecting, and regarding as impertinent and lifeless, externality and authority."[4] "The brunt of Schmitt's argument," Ulmen notes, "is directed against inwardness — against this Protestant impulse" (p. xiii). The Protestant principle of inwardness, of interiority, does not mean "otherworldliness." It means, precisely, "worldliness."[5] Otherworldliness takes the things of this world as real and their reality consists in their signifying, manifesting, or pointing to, other realities. Their being makes something other than themselves visible. Their own visibility is the visibility of what is other. For inwardness, on the other hand, the "outside world," the "external world," points to nothing, signifies, or stands for, nothing, being, as Hegel has it, "lifeless." Interiority, inwardness, divests the world of significance except as it is derived from inwardness itself. Protestant doctrines of the Eucharist express this perfectly. Protestant inwardness begins that "disenchantment" (*Entzauberung*) Max Weber identifies with modernity. Schmitt insists in this little essay that "[a]n arrangement making the invisible visible must be rooted in the invisible and appear in the visible" (p. 52). The Church's insistence upon its visibility is an insistence on its reality.

VC prepares for RCAPF by taking the position that the worldly reality of a community such as the Church cannot be separated from what it makes manifest and that what it makes manifest is something which cannot be dissolved into the "innerness" of the "world within," nor reduced to the "inner worldliness" of what Schmitt will call in RCAPF "economic thinking." Rather, to use Schmitt's term in *RCAPF*, it is "transcendent." In contrast, economic thinking has no room for "the notion that something preceded the given reality of material things — that there is

4. G. W. F. Hegel, *Lectures on the History of Philosophy*, ed. and tr. by E. S. Haldane and Francis H. Simpson (New York: The Humanities Press, 1968), Vol. III, pp. 217-218 (translation amended).

5. "Protestantism, by its very nature, demands a secular reality. . . Protestant secularism is a necessary element of Protestant realization." Paul Tillich, *The Protestant Era* (Chicago, IL: University of Chicago Press, 1948), 213-214.

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something transcendent" (p. 27).[6] Thus VC prefigures Schmitt's thematic concern in *RCAPF*, the opposition between economic thinking and political reality, which exists as "idea," or what he calls "representation." Schmitt finds the most eminent instance of the political idea, or representation, in Catholicism and, therefore, finds in Catholicism the complete antithesis to economic thinking (p. 13). Schmitt's concern with Roman Catholicism in RCAPF is not that of a theologian, nor of a religious apologist, but that of the political theorist. "One can observe," Schmitt says, "how the understanding of every type of representation disappears with the spread of economic thinking. Should economic thinking succeed in realizing its utopian goal," it would bring "about an absolutely unpolitical condition of human society" (p. 25), what Weber called "the routinized economic cosmos."[7] The aim of *RCAPF* is, in the words of the title given to it when it was first published in English in 1931, to show "the necessity of politics" and, if we are to understand political reality, the inevitability of "the idea of representation." Schmitt studies Roman Catholicism in order to study political form. "To the political belongs the idea, because there is no politics without authority and no authority without an ethos of belief . . . The political power of Catholicism rests neither on economic nor military means but rather on the absolute realization of authority" (pp. 17-18).

In order to delineate Roman Catholicism as a political form, Schmitt has to set forth Catholicism as a religious institution and the way in which the Church understands itself to be a universal institution. The Church is to the highest possible degree an instance of what Schmitt terms a *complexio oppositorum*, a whole embracing within itself, without being defined by them, antitheses which it reconciles but does not abolish. In the case of the Church "there appears to be no antithesis which it does not embrace" (p. 7). Schmitt's presentation of Catholicism as this union of all the antitheses resembles the "rhythm of the counter-tension of opposites" characteristic of Erich Przywara's account of Catholicism.[8] An examination of almost any of

6. Max Weber's account of science describes economic thinking as Schmitt understands it. It "develops refutations of every intellectual approach which in any way asks for a 'meaning' of inner-worldly occurrences." Max Weber, "Religious Rejections of the World and Their Directions" in *From Max Weber: Essays in Sociology*, eds. H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), p. 351.

7. *Ibid.*, p. 355.

8. Erich Przywara, S. J, *Religionsbegründung* (Freiburg im B.: Herder, 1923); *Gottgeheimnis der Welt* (München: Theatiner Verlag, 1923); *Religionsphilosophie Katholischen Theologie* (München: Oldenbourg, 1926); *Ringen der Gegenwart. Gesammelte Aufsätze 1922-1927* (Augsburg: Dr. Benno Filser-Verlag, G.M.B.H., 1929), 2 Volumes; *Analogia Entis* (München: Verlag Kosel, 1932); *Augustinus. Die Gestalt als Gefüge* (Leipzig: Jacob Hegner, 1934). Przywara was one of the most prominent of Catholic theologians and philosophers in Weimar Germany. An original thinker, he exercised considerable influence. For Karl Barth, Przywara was the Catholic thinker *par excellence*. Schmitt contributed an article, "Nomos, Nahme, Name," to the *Festchrift* entitled *Der Beständige Aufbruch* published in honor of Erich Przywara in 1959.

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Przywara's books will suggest the extent to which Schmitt's presentation of Catholicism is indebted to Przywara for its *theological-religious content*.[9] Przywara provides a theological paradigm which supports Schmitt's claim "[t]hat the essence of the Roman-Catholic *complexio oppositorum* lies in a specific, formal superiority over the matter of human life such as no other *imperium* has ever known" (p. 8). With Schmitt the theological paradigm becomes a paradigm of the political idea. "This formal character of Roman Catholicism is based on a strict realization of the principle of representation, the particularity of which is most evident in its antithesis to the economic-technical thinking dominant today" (p. 8).

It is the Catholic Church as political idea that explains the existence of what Schmitt calls "the anti-Roman attitude," which accompanies the Church throughout its history. *RCAPF* opens with the evocation of Catholicism as the enemy, with what those who have understood themselves to be the enemies of the Catholic Church have taken the Catholic Church to be: the Whore of Babylon, the Antichrist of the Apocalypse, clerical power and the sinister Jesuit. "The mythical power of this image is deeper and stronger than any economic calculation" (p. 3). Schmitt's point here is that economic rationalism cannot account for the anti-Roman attitude, because to be in any significant sense is not simply factual existence; it is to represent. Nor is enmity a subjective disposition, merely personal dislike; it is an ontological category, opposition to the being of something. The heart of the anti-Roman attitude is opposition to the Church's public visibility, to what it represents which is inseparable from what it is.[10] Enmity demands "representation," public visibility. The anti-Roman attitude treats Rome as "the enemy" and in doing so recognizes, even if only in

9. Consider, for instance, the following statements from *Polarity*, a translation of *Religionsphilosophie der Katholischen Theologie*. "The so-called syncretism of Catholic religion is also in its true sense not a defect but an actual enrichment of it. It is not an immanental and rationalistic accumulation achieved from below, but an embracing of the whole of the creaturely from above. . . . For therein they [the various human manifestations of religion] preserve the creaturely in its distinctive nature, as it is given through the *analogia entis*, as the tension-in-unity of its opposites 'in the presence of God,' not in some way or another 'as God.' Every one-sided proclamation which gives preference to one aspect of the creaturely over another is in one way or another immediately the equivalent of the *deification* of that aspect . . . The *analogia entis* here . . . provided to some extent the solution of the problem of *contradictions*. It converted it into the problem of *opposites*, when (through its position as a fixed point outside the tangle of problems) it rendered possible a relatively secure tension-in-unity of these antitheses. This (through its character as tension-in-unity *before* God, not *as* God) is in no way rendered absolute at any one of its poles, but exhibits a freely swinging poise . . ." Erich Przywara, *Polarity. A German Catholic's Interpretation of Religion*, tr. by A. C. Bouquet (London: Oxford University Press, 1935), pp. 87 88 and 128.

10. "The great betrayal laid to the Catholic Church is that it does not conceive Christ as a private person, does not conceive Christianity as a private matter, something wholly and inwardly spiritual, but rather has given it form as a visible institution." RCAPF, 31-32.

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order to repudiate it, the Church's essentially public and representative character. It acknowledges Catholicism's claim to be a political idea in the very denial of the claim. The anti-Roman attitude cannot oppose the Church's claim without making its own claim as a political idea and so also "stand for" something. Because economic thinking knows nothing of representation, it "knows nothing of any anti-Roman attitude" (p. 15). In economic thinking no one stands for anything except himself and his interests. The core of RCAPF is the fundamental antithesis between "the economic thinking of our age and the political idea of Catholicism" — and having taken Catholicism as the paradigm of the political idea, this opposition for Schmitt is the opposition between economic rationality and the political idea as such — "because this idea contradicts everything synonymous with objectivity, integrity, and rationality in economic thinking" (p. 13). The "fundamental antithesis" is an opposition concerning what counts as reason. At issue is the identification of rationality with economic thinking, for "here the concept of the rational is warped fantastically" (p. 15).[11] Schmitt argues that there is a rationality that must be inherent in politics itself if it is to be understood as a fully human activity.[12] Economic-technical rationalism divests politics of that rationality and politics disappears, replaced by things like "management" and "policy studies." "There must no longer be political problems, only organizational-technical and economic-sociological tasks."[13] Politics which has not been depoliticized becomes, like Catholicism, something irrational.

Schmitt had started from the depoliticization that he believed to be endemic to European modernity: "nothing is more modern than the onslaught against the political."[14] In modern societies nothing "stands for" anything. Depoliticization is the incapacity of individuals to be anything more than individuals and of societies to be anything more than collections, heaps, of these individuals.[15] The "equality" which Tocqueville identifies as "democracy," the

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11. "Economic rationalism . . . has erected an edifice wherein everything runs strictly according to plan — everything calculable . . . a mechanism . . . called rational without bringing into question what is most important — the rationality of the purpose of this supremely rational mechanism." RCAPF, *op. cit.*, p. 15.

12. This is the point implicit in Schmitt's discussion of rhetoric as "representative discourse." How "the lack of understanding of rhetoric" is "the manifestation of the polar dualism of the age. . . The ability to create form . . . has its essence in the ability to create the language of a great rhetoric." *Ibid.*, pp. 22-24.

13. *Political Theology. Four Chapters on the Concept of Sovereignty* (Cambridge, MA: MIT Press, 1985), p. 65.

14. *Ibid.*

15. Tocqueville called this "the democratic weakness of subjects: Among democratic peoples individuals are very weak . . . No where does the citizen appear smaller than in a democratic nation." Alexis de Tocqueville, *Democracy in America* (New York: Doubleday & Co., Inc., 1969), pp. 677 and 469.

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new principle of modern societies, means that everyone is an individual and only an individual: "In democracies," Tocqueville says, "a father is only an older and wealthier citizen than his son,"[16] He observes that "[a]lthough it would seem that human opinions were no more than a sort of mental dust open to the wind on every side and unable to come together and take shape. . . [.] there are no societies that manage in that way. . . . [M]en might exist, but there could be no body social. So for society to exist . . . it is essential that all the minds of the citizens should be rallied and held together by some leading ideas."[17]

Tocqueville's "leading ideas" is Schmitt's "representation." Representation is the form of social bodies, what makes them visible to themselves and to others, what makes them public, what makes them real: "For that which is seen by all we say to be."[18] Representation, the standing for something in which is given the objective reality of a society, is what Schmitt means by "political idea." Representation is constitutive of a society. A family constitutes a reality not visible in purely biological and psychological terms. But with us, as Tocqueville has observed, father and son are terms devoid of public reality; they signify a private, subjective relation, whose substance is entirely psychological, the feelings of the individuals concerned. This is the absence of representation or the "political idea." With the disappearance of representation the biological lineaments of the family recede from view and disappear. Subjectivities cannot represent. Reduced to the subjectivity of individuals, there can be no "royal families." Representation is the visibility of human societies in terms of a constitutive reality. Schmitt's account of representation stands exactly opposed to what Max Weber called "the disenchantment of the world" (*die Entzauberung der Welt*).

In the "Introduction" Ulmen explains why he has bothered to re-translate the "seemingly obscure essay first published in 1923." He argues that Schmitt's *RCAPF* is "a metacritical antitype which presents [Max] Weber's thesis [about the relation between Calvinism and capitalism] with a Catholic complement" (p. xix). "Like Weber," Ulmen writes, "Schmitt is fundamentally concerned with the course of modern European culture and civilization. Whereas for Weber this is primarily a question of modern capitalism, for Schmitt it is primarily a question of the modern state" (p. xix). Ulmen points to what was the central issue for Schmitt as a political philosopher, the modern state as a political form, or, since "modern state" is a redundancy, the state as a political form. Schmitt clearly identified the state as the political form of modernity: "It would be untenable and only confusing to designate any other polities, systems or orders of world history as *states*."[19] This political form is expressed in the term "sovereignty." What does the new political entity, the state, "stand for," what does it represent? It rep-

16. *Ibid.*, p. 586.
17. *Ibid.*, pp. 433-434.
18. Aristotle, *Nicomachean Ethics*, X. 2 (1172b36).
19. Carl Schmitt, "On the Barbaric Character of Shakespeare's Drama," in *Telos* 72 (Summer 1987), p. 149.

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resents "what Hobbes called an *imperium rationis* and Hegel described as the realm of objective reason beyond theology."[20] In other words the state, rule as sovereignty, represents *enlightenment*.

Here, perhaps, can be located the source for the disconnection that some have sensed between RCAPF and Schmitt's other writings. Schmitt was to invest heavily in an effort to underwrite the state intellectually, yet the state, the political form of modernity, is the engine of depoliticization. The question must be asked: Schmitt had clearly identified the state as the political form of modernity, but had he achieved clarity about that political form? The state, the political representation of *enlightenment*, unable simultaneously to embrace and sustain antitheses, therefore with a diminished capacity for representation, was not capable of being a *complexio oppositorum*. For the state, to embrace was to suppress. Thus in the *imperium rationis* of the state religion as such is not public. If religion is public, it can be so only as the ordinance of the sovereign.[21] It is the sovereign who makes religion public, and, therefore, makes it reasonable to believe. Religion, however, solely as an ordinance of the sovereign ceases to be religion. But the sovereign need not have a public opinion about religion. Then all religions are private matters beyond reason. Protestantism, the formalization of Christianity as the religion of inwardness, is a complement to this political idea. Religion which insists on its publicness, a publicness which does not derive solely from the sovereign's ordinance, is "the Kingdome of Darknesse," the false religion — as against Protestant inwardness — of "Popery."[22] Public status being the exclusive prerogative of the state, whatever enjoys public existence derives it from the state. Schmitt contrasts medieval "barbarity" with modern "politicality."[23] In the Middle Ages everyone had some kind of public status by virtue of their work, profession, or estate i.e., their actions had public significance; in some kind of capacity they could act publicly and, therefore, politically. In RCAPF Schmitt speaks of this as "the medieval capacity to create representative figures" (p. 19). "Barbarity" in Schmitt's use means just this: there are many public actors. Modernity means there is only one public actor, the state, or, in the early modern usage, "the sovereign." Medieval "barbarity" is pictured in Locke's account of the "state of nature" in which men possess "the executive power of the law of nature," which in turn is the situation portrayed in the "cowboy," or "western," film, where everybody is an actor, or plays a public role, until pacified by the

20. *Ibid.*

21. "Suppose the magistrate revenge her cause, / 'T is only for transgressing human laws" Dryden, *The Hind and the Panther*, Vol. I, pp. 633-634. "Her cause" in this line means the Church's.

22. Thomas Hobbes, *Leviathan*, ed. by Richard Tuck (Cambridge: Cambridge University Press, 1991), Part IV, pp. 417-482.

23. Schmitt, "On the Barbaric Character of Shakespeare's Drama," *op. cit.*

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sheriff, or the marshal, or the "good guys."

The state is the regime of *liberté, égalité, fraternité. Liberté* means what Hegel called "the right to satisfaction of the particularity of the subject," i.e., to be self-defined through my own choice of purposes and to be unconstrained by the those of others; to be what I choose to be and to have that choice recognized and registered by others. *Égalité* means that all have the same status; that the state displaces all social forms which confer status independently of the state. No status conferred by society has any standing. Each is free from any social constraint. The authority of all social roles is dissolved. Therefore, *Fraternité.* No longer separated from one another by what are regarded as arbitrary social forms, each confronts the other as self-defined, unfounded by anything except one's own choice, ultimate. We are together in all our differences because we are the authors of our selves in those differences. But while "self-definition" means that the individual gives himself his own content, it does not mean that he gives himself the form of "the individual." That is what the state confers. The state suppresses every difference among people for the sake of the individual free from all social ties. One manner in which it does this is to convert all differences from something possessing objective meaning into adjectives of individual subjectivity to which are attributed "rights." Race, gender, ethnicity, class, for instance, are not societies nor the bonds of any actual society. They are abstractions. They do not establish any actual social ties. They resonate in individual subjectivities and as such becomes the means of dissolving actual societies. In the state everyone, ultimately, is a bohemian and, therefore, as Schmitt observes in RCAPF (p. 20), represents nothing except himself.

RCAPF was written, Schmitt informs us,[24] together with *Political Theology: Four Chapters on the Concept of Sovereignty*. The connection between these two works does not lie in the conjunction of Political Theology and Roman Catholicism, for, while the Church may be a paradigm for the political idea understood as the idea of representation, it is not a paradigm for rule in the *civitas terrana*.[25] Nor is it Catholicism that stands behind Schmitt's political theory. The connection is the conjunction between Sovereignty and Political Form. Schmitt as a political theorist is not a Catholic thinker. This is sharply brought out in a conversation that occurred in 1943 between the Catholic philosopher, Josef Pieper, and Carl Schmitt, which Pieper reports in his autobiography. ". . . I [Josef Pieper] asked him [Carl Schmitt] why, in his book on the "concept of the political" he had not written a syllable about the *bonum commune*, since the

24. In the preface to the first edition of *Political Theology* (1922).

25. See Robert Bellarmine, *Controversarium de membris ecclesiae*, lib. III: *De laicis sive secularibus*, chap. vi (*Disputes about the Members of the Church*, Bk. III: *Concerning Laymen*, chap. vi,) in *Opera* (Paris: Vives, 1870), Vol. III, pp. 10-12. A translation of this instructive passage may be found in Yves R. Simon, *The Philosophy of Democratic Government* (Chicago: University of Chicago Press, 1951), pp. 166-167.

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whole meaning of politics surely lay in the realization of the common good. He retorted sharply: 'Anyone who speaks of the *bonum commune* is intent on deception'."[26] Juxtapose this with the sentence from *Political Theology*: "Everyone agrees that whenever antagonisms appear within a state, every party wants the general good — therein resides after all the *bellum omnium contra omnes*."[27] Whatever the terms of Schmitt's personal subscription to Catholicism, it could not be clearer that his political theory is not derived from Catholicism.[28] Nor could Schmitt's subscription as a political theorist to the fundamental principle of modern political philosophy be made clearer, than the words which immediately follow the sentence last quoted make it: "But sovereignty (and thus the state itself) resides in deciding this controversy . . ." i.e., the *bellum omnium contra omnes*. In these two statements, which follow one another in *Political Theology*, Schmitt repeats the founding moment from which modern political philosophy emerges. "[The state] is in the decisive case the ultimate authority." The determination of the decisive case does not arise from consideration of the *bonum commune*, the end. Sovereignty is independent of claims made concerning what the end is. The political form, sovereignty, or the state, becomes possible only with the rejection of political community defined by end-*telos*. Sovereignty, Hobbes points out, understands rule as the subjection of persons, not the subordination of actions to ends.[29] What defines the political form sovereignty, in Schmitt's formulation, is decision, i.e., the power to effect. It is what Machiavelli called *la verità effettuale*.[30] The political community is precisely the effect of rule as sovereignty. The state is rule defined independently of the community — and of the "parts" which make up the community — over which

26. Josef Pieper, *No One Could Have Known. An Autobiography: The Early Years* (San Francisco, CA: Ignatius Press, 1987), p. 175.

27. *Political Theology*, *op. cit.*, p. 9.

28. The core principle of Catholic teaching concerning the political order is the primacy of the common good. "Hence it is the noble perogative and function of the State to control, aid and direct the private and individual activities of national life that they converge harmoniously towards the common good. That good can neither be defined according to arbitrary ideas nor can it accept for its standard primarily the material prosperity of society, but rather it should be defined according to the harmonious development and the natural perfection of man." Pope Pius XII, *Encyclical Letter on the Function of the State in the Modern World* (Washington, DC: National Catholic Welfare Conference, 1939), IV, 54. p. 24. "Natural perfection of man" means man's end — telos as it is naturally knowable to human beings without the aid of divine revelation. Compare Aristotle, *Politics* III. 1280a25-281a10. That Schmitt's political theory is not derived from Catholicism is seen by Maurice Auerbach, "Carl Schmitt's Quest for the Political," *Interpretation* (Winter 1993-94), Vol. 21, No. 2, pp. 201-214. Also by Mark Lilla, "The Enemy of Liberalism," *New York Review of Books*, May 15, 1997.

29. Thomas Hobbes, *op. cit.*, III, 42, p. 398.

30. *Il Principe* XV in Niccolò Macchiavelli, *Il Principe e Discorsi*, ed. Sergio Bertelli (Milano: Editore Feltrinelli, 1960), pp. 64-66.

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it is exercised. Schmitt explicitly identified himself with Bodin and Hobbes.[31] But above all with Hobbes: "Hobbes remains an incomparable teacher . . . Across the centuries we reach out to him: *Non iam frustra doces!* [Thomas Hobbes, now you do not teach in vain.][32]

Francis Slade

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31. So Schmitt speaks of "the founders of my discipline, Jean Bodin and Thomas Hobbes." See "Schmitt at Nuremburg, Appendix III," in *Telos* 72 (Summer 1987), p. 128. "My discipline" strictly construed means political philosophy founding the state. See Francis Slade, "Rule As Sovereignty: The Universal and Homogeneous State," in *The Truthful and the Good*, ed. by John J. Drummond and James G. Hart (Boston: Kluwer Academic Publishers. 1996), pp. 159-180.

32. Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, tr. by George Schwab and Edna Hilfstein (Westport, Connecticut: Greenwood Press, 1996), p. 86. Schmitt, Hobbes, Bodin: it is Macchiavelli who stands behind them all.

Schmitt and Hobbes

Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, tr. by George Schwab and Erna Hilfstein (Westport, CT: Greenwood Press, 1996), 121+ xxxi pp.

Given the proliferation of publications on Carl Schmitt, it is difficult to remember that not so long ago he was an intellectual pariah. Considering the growing number of scholars currently sustaining the "Schmitt boom," it is likewise easy to forget that for many years George Schwab was the lone voice in Schmitt scholarship in the US. Against enormous criticism (and occasional personal ostracism), Schwab insisted that Schmitt's ideas were essential for political theory. Schwab not only wrote the first book on Schmitt in English but also provided the first English translation of one Schmitt's main works. No matter what one may think of Schmitt, Schwab is owed a debt of gratitude for his persistence. The recent translation of Schmitt's works on Hobbes constitutes another significant contribution by Schwab because the relation between Hobbes and Schmitt is

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one of the most important questions surrounding Schmitt: it includes a distinct, though occasionally vacillating, personal identification as well as an association of ideas and theories scattered throughout Schmitt's corpus.[1]

In his *Leviathan*, Schmitt personally identifies with Hobbes' fate. It is not difficult to detect Schmitt's *persona* in his accolades for Hobbes: "lonely as every pioneer; misunderstood as is everyone whose political thought does not gain acceptance among his own people; unrewarded, as one who opened a gate through which others marched on . . ." (p. 86). He then concludes by declaring Hobbes "a sole retriever of an ancient prudence" — a phrase he had used to describe himself while defending his friend-enemy thesis against Hermann Heller's critique in 1928.[2] In his postwar musing, *Ex Captivitate Salus*,[3] Schmitt again made a similar identification in terms of *Geist* and ultimate personal fate. Neither can one read Schmitt's early works such as *The Concept of the Political* or his later study *Der Nomos der Erde* without encountering fundamental Hobbesian ideas that have become as associated with Schmitt as they were with Hobbes: *Naturzustand*, *bellum omnium contra omnes*, *homo homini lupus*, or "protection and obedience."[4]

However, Schmitt's *Leviathan* and his article "The State as Mechanism in Hobbes and Descartes" (added as an appendix by Schwab) are the only two works Schmitt devoted exclusively to Hobbes.[5] In the introduction, Schwab places these works in the historical, political and personal contexts in which they were written in 1937-1938, without which they cannot be properly understood. After compromising himself and forever tainting his reputation during the first four years of the Third Reich, by the end of 1936 Schmitt had become an outcast from a Nazi regime he had tried to steer into a more conservative and less radical direction. Under serious attack by the SS, Schmitt did not know what might hap-

1. George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936*, 2nd printing with a new foreword (Chicago and London: The University of Chicago Press, 1996). See also Schwab's translations of Schmitt's *The Concept of the Political* (New Brunswick: Rutgers University Press, 1976) and *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Mass: MIT Press, 1985/1988).

2. See Schmitt's letter to Hermann Heller of December 18, 1928, in Piet Tommissen, "Problemen rond de houding van Carl Schmitt in en na 1933," *Liber Memoralis* (Tien Jaar Economische Hogesschool Limburg, Limburg, 1979), pp. 182-183. See also Heller, "Bemerkungen zur staats- und rechtstheoretischen Problematik der Gegenwart," in *Archiv des öffentlichen Rechts*, Vol. 16, No. 3 (1929), 321-354.

3. Carl Schmitt, *Ex Captivitate Salus: Erfahrungen der Zeit 1945/47* (Cologne: Greven Verlag, 1950), pp. 63-78.

4. Schmitt, *The Concept of the Political*, *op. cit.*, pp. 52-68. Note how Leo Strauss analyzes the tension between Hobbesian and Schmittian ideas in his commentary on Schmitt's book reprinted at the end of Schwab's translation, pp. 87-105. See also Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin: Duncker & Humblot, 1950\1974).

5. Schmitt did, of course, augment these works in significant ways in his "Die vollendete Reformation," in *Der Staat*, Vol. 4 (1965), pp. 51-69.

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pen to him. As indicated in the "Introduction," "disillusioned and frightened," Schmitt now "signaled in his writing on the *Leviathan* that he was reconnecting himself to the pre-1933 Schmitt" (p. x). A much sobered Schmitt returned to Hobbes' axiom concerning the relation between protection and obedience as a fundamental principle in political theory as well as in the actual world of political realities where real decisions determine such questions as life and death.

However, this reversal was more subtle than Schwab leads one to believe. As much as Schmitt might later have wanted these works to be compared to Ernst Jünger's allegorical anti-Nazi book, *On the Marble Cliffs*, his Hobbes publications certainly did not constitute an act of defiance, let alone resistance. Nonetheless, the shift Schwab indicates was clearly discernible to anyone familiar with Schmitt's writings at the time. Even the very reconnection with Hobbes was suggestive, since in 1934, in "*Über die drei Arten des rechtswissenschaftlichen Denkens,*" Schmitt had moved away from his earlier identification with Hobbesian decisionist legal theory. At that point he began to argue that decisionism had to be superseded by concrete order thinking.[6]

Yet, in 1937 not only was Hobbes again center stage, but the way in which Schmitt now addressed state theory reflected, in both content and tone, the very conservative thinking his Nazi critics had accused him of perpetuating. Moreover, Schmitt defended Hobbes against those who categorized him as the father of totalitarianism. Hobbes' theory of the state, Schmitt asserted, is irreconcilable with those systems of government seeking such total control. On the contrary, according to Schmitt, Hobbes' theory is compatible with the bourgeois *Rechtsstaat*. Schmitt even rediscovered the centrality of Hobbes' individualism (pp. 71-72).

As Schwab notes, in stark contrast to his 1933-1936 writings, Schmitt's Hobbes works are "remarkably free of Nazi jargon" (p. xxi). In fact, there is little to indicate explicitly that they were written during the Third Reich. In most respects, these two pieces on Hobbes read like classical political theory devoid of the *völkisch* concepts and interpretations Schmitt had integrated, though often awkwardly and artificially, into his writings in the early years of the Nazi dictatorship when he bastardized his ideas to make them acceptable to party ideologues. Also conspicuous by its absence is the homage Schmitt had earlier felt obliged to pay to Nazi leaders, terminology, and ideological currents. Schmitt's abandonment of these references reinforced further the impression that the Weimar Schmitt had returned.

Schwab is thus correct in arguing that the *Leviathan* must be seen in its "numerous aspects" in order to grasp "Schmitt's theory at a critical juncture of his life" (p. ix). Therefore, it is as necessary to read this work to understand Schmitt's intellectual relation to Hobbes as it is to clarify Schmitt's post-1936 stance toward the Nazi regime. For these reasons, Schmitt's *Leviathan* ranks

6. Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Hamburg, Hanseatische Verlagsanstalt, 1934), pp. 27-29.

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among his most significant works and Schwab and Enra Hilfstein should be commended for making it available to the English-speaking world. Schwab and Hilfstein produce a very reliable translation which renders Schmitt's German in smooth readable English. It not only conveys Schmitt's ideas accurately but preserves his tone and style to a remarkable degree.

Yet, Schmitt's *Leviathan* remains as troublesome today as when it was originally written. When I questioned Schmitt about the book, he only increased my unease when he said that he considered *Leviathan* his "most important book." Having just spent a considerable amount of time and effort grappling with such complex works as *Die Diktatur*, *Legalität und Legitimität*, and *Der Hüter der Verfassung*, I was perplexed by this evaluation, which Schmitt ultimately never convincingly explained. Whether his *Leviathan* deserves the importance he placed on it remains debatable. In terms of analyses and broad intellectual influence, this work is in no way comparable to several of his other major writings. Furthermore, considering the often discussed intellectual affinity of Schmitt and Hobbes, the reader of *Leviathan* is left with a sense of incompleteness, for this little book is not a systematic or comprehensive study of Hobbes' *Leviathan* or Hobbesian political theory. Instead, Schmitt focused on Hobbes' use of the *Leviathan* as a political symbol. Starting with symbolic "Christian-theological and Jewish-cabalistic" interpretations of the *Leviathan*, Schmitt moves to the Hobbesian images of the "huge man, the huge animal, the huge machine" and the "*deus mortalis* (mortal god)," all symbols of the modern state (p. 19).

A creation of "human reason and human inventiveness," the European state emerged in the 17th century with the establishment of the *ius publicum Europaeum*. In order to overcome the theoretically postulated state of nature and the actual experience of the incessant civil and sectarian warfare of that age, the modern state became an institution endowed with uncontested sovereignty, whose "power is supreme" (p. 33). Only such a powerful entity could guarantee the security of its citizens within the clearly defined territorial parameters over which the state exercised sovereignty, whether the threats to their safety and tranquility stemmed from internal or external enemies. Schmitt described this state as the "first product of the age of technology, the first modern mechanism in a grand style, a *machina machinarum*" (p. 34). Over subsequent centuries, the historical process of mechanization and "neutralization" transformed the state into a "technically neutral instrument." By the 19th century, "legal positivism" had turned the constitutional state into a neutral command mechanism for compelling obedience; but by that time it was a state whose legitimacy stemmed merely from formal "legality" which was "indifferent to aims, intrinsic truths, and justice" (pp. 41-2, 68). It was a liberal, law-giving state which had also "placed the Leviathan in harness" and at the same time "enshrined a catalogue of individual rights" free from state control. In the process, the private sphere was transformed from the domain of the state to that of "society." Soon, however, these pluralistic social

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forces — modern political parties, trade unions, churches, and other social organizations — "perpetrated the destruction of the state by using methods inherent in the liberal law state." In essence, the "most illiberal forces" utilized liberal ideas and institutions to "cut up the Leviathan and divide his flesh among themselves. Thus did the mortal god die for the second time" (pp. 73-74).

Schmitt located the genesis of this ultimate demise already in Hobbes' own political philosophy. According to Schmitt, in drawing a distinction between "inner faith and outer confession" (the private and public spheres), Hobbes had opened the way for private individual freedom to coexist alongside the sovereign power of the state so necessary for overcoming the state of nature and ensuring order, peace and security through its monopoly of power. "This contained the seed of death that destroyed the mighty Leviathan from within" (p. 57). Over the centuries, this "barely visible crack" was widened into a major fissure, culminating in the reversal of this relation between state power and individual freedom. What had been merely an implicit right in the private sphere gradually emerged as the dominating principle, while the state's sovereign power required for the maintenance of public peace and order lapsed into a secondary position of a "mere proviso" (p. 58).

Aside from dealing only with a limited aspect of Hobbes and doing so from this particular angle, Schmitt's work is fragmentary and incomplete in other ways as well. Merely on the basis of this book, one cannot fully comprehend even Schmitt's interpretation of Hobbes and its relation to his own political theory. As Schwab states in his introduction, one must read this book in light of Schmitt's Weimar treatment of Hobbes as well as in the framework of Schmitt's own concept of the crucial distinction between a qualitative and quantitative total state. Schwab argues that Schmitt's theoretical construct recognized a key differentiation between the "political sphere" (state) and the "non-political domain" (society) that had eroded by the 20th century (p. x). Historically, the qualitative total state, while monopolizing political power, intervened in society only on those occasions necessary to protect the state or society from domestic or foreign enemies. However, in Weimar a multiplicity of political parties emerged and challenged the state's domination of the political sphere. As Schmitt described it, "between the state and its government at one pole and the mass of citizens at the other pole, a thoroughly organized multi-party system has inserted itself and is today in possession of the monopoly of politics" (p. xi). In the absence of any fundamental consensus among Germans about the kind of society and government that should replace the vanquished *Kaiserreich*, these parties splintered the political sphere and divided the country so intensely against itself that, at times, Weimar bordered on the very civil war the now debilitated Hobbesian *Leviathan* had been created to prevent. For there were primarily *Interessenparteien* and *Weltanschauungsparteien* with exclusive political constituencies and objectives based on class, economic interest, religion, or ideology; several of them openly

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espoused totalitarian visions for the country's future. They were convinced that they alone had "the correct views, the correct *Weltanschauung*, the correct form of state, the correct economic system" (p. xi).

Through electoral means and other institutions of liberal parliamentarianism or a direct seizure of power, each party tried to wrest the governmental apparatus of the state in order to realize its objectives to the exclusion of those of its political rivals. Not only did these political parties collectively usurp the state's monopoly on the political sphere, each individually sought to create the "quantitative total state," which, in pursuit of its peculiar political, economic, or ideological agendas "immerse[s] itself indiscriminately into every realm, into every sphere of human existence. [It] altogether knows absolutely no domain that is free of state interference . . ." (p. x). By the early 1930's, Schmitt feared this process would culminate in either the disintegration of Weimar and the German state or the seizure of power by a totalitarian party that would then use the state to totally transform every aspect of society in accordance with the principles of its ideology. Schmitt's involvement with the presidential system at the end of Weimar was an effort to preclude this result. Even while Schmitt later collaborated with the Nazis, he was still trying to salvage as much as possible of the traditional state and society from the all-pervasive interference and transformation inherent in universal Nazification.

Although Schwab provides a good explanation of some of this, a true appreciation necessitates a more thorough familiarity with Schmitt's Weimar ideas, as well as with some of the studies of him. Also, the book must be read in conjunction with the post-WWII elaboration of Schmitt's ideas concerning Hobbes, especially as illustrated in the often cited "Hobbes Crystal" diagram regarding decision, authority, and obedience.[7]

Equally disturbing is the role Schmitt attributed to Jews in transforming the Hobbesian crack into a major fissure that ultimately led to the emasculation of the Leviathan. Schwab is correct in emphasizing that Schmitt had broadened his identification of the alleged culprits who undermined the state to include not only Jews but the papacy and "power-thirsty Presbyterian churches or sects" as well as Kant, Goethe, and others. Similarly, Schwab notes that Schmitt's criticism of Jews lacks the venom that characterized his 1936 statements, when he unsuccessfully tried to exploit anti-Semitism to prove his own ideological conformity to the Nazis (pp. xx-xxi). However, Schwab concedes that by the time Schmitt wrote *Leviathan* he had not entirely abandoned his "anti-Jewish posture" (p. xxviii). This points to the limitations of Schmitt's attempt to reconnect himself with his pre-1933 positions, for in his ideas, political stances and personal relations, the Weimar Schmitt had been free of the anti-Semitism that gradually surfaced in his writings during the early Nazi era.

7. See the footnotes and corollaries to the 1963 edition of Schmitt, *Der Begriff des Politischen* (Berlin: Duncker & Humblot), especially pp. 121-122.

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Schmitt's assertions about Jews *vis-à-vis* the ruination of the leviathan can certainly be questioned from the standpoint of historical accuracy. Moreover, his interpretation of the process by which various "social forces" exploited liberalism to the detriment of the state would be as internally consistent and convincing by completely excluding Jews as a factor. In numerous powerful and influential works in Weimar, he had advanced similar interpretations about liberalism and the state without the need to relate any of this to Jews. Indeed, he had previously engaged Leo Strauss and other Jewish scholars in support of his ideas, often praising their contributions to German legal and political theory.

Also relevant is the imagery conveyed by the language Schmitt uses to depict Jews in *Leviathan*. Although limited in number and dispersed throughout the text, they are telling nonetheless. Referring to Jewish mythology, Schmitt wrote that "the Jews stand by and watch how the people of the world kill one another. This mutual 'ritual slaughter and massacre' is for them lawful and 'kosher,' and they therefore eat the flesh of the slaughtered peoples and are sustained by it" (pp. 8-9). Elsewhere, he noted "Jewish hatred and Jewish feelings of superiority" or the "Jewish tactic of drawing distinctions." Schmitt characterized Mendelssohn as "endowed with the unerring instinct for the undermining of state power that served to paralyze the alien and to emancipate his own Jewish folk" (p. 60). Discussing the "Jewish front" that Schmitt claimed emerged in public life with emancipation in the 19th century, he wrote that Stahl-Jolson "used a deceitful manner to mask his motivation" but in the end succeeded in doing "his work as a Jewish thinker . . . in castrating a leviathan that had been full of vitality" (pp. 69-70).

This raises a whole host of questions. Although Schwab correctly distinguishes the cultural and religious nature of Schmitt's anti-Semitism from Nazi biologically-based racial anti-Semitism, he tends to overlook the fact that Schmitt's contentions in this book about Jewish influence were not necessarily incompatible with Nazi perspectives on the destructive function of Jews in modern history. Had Schmitt really come to believe that Jewish scholars (Spinoza, Mendelssohn, Stahl-Jolson) were such pivotal and detrimental historical agents? Or was he still paying lip-service to the Nazi state, continuing to exploit anti-Semitism as a matter of course? But why, if he had ceased paying homage to Nazi ideology and party leaders in his writings, did he persist in this particular interpretation of Jewish influence? It makes one wonder about the possibility that Schmitt's motives might have been even more personal. Perhaps he was still venting his residual anger against Jewish emigre intellectuals whose attacks on him and revelations about his anti-Nazi past and prior close personal and intellectual Jewish affiliations he held partially accountable for the 1936 SS assault that had seriously endangered his life and career. That several of these emigres had been close friends and students only intensified the sense of betrayal on both sides. When I asked Schmitt himself directly about these references in his *Leviathan*, I

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again received an unsatisfactory reply, as he simply said that with this book he had ended his involvement with the Jewish question.[8]

Since this is the first English translation of a book Schmitt wrote during the Nazi era, it is bound to stir the emotional caldron in which this phase of his life and work is usually handled. But given Schmitt's identification with Hobbes, this translation may also serve as the impetus for a long overdue major study of the relation between these seminal thinkers. Such an attempt was made decades ago by Helmut Rumpf and more recently by Gershon Weiler, but neither has adequately answered the plethora of questions raised by the subject.[9] The recent trend in Schmitt historiography toward the so-called "theological twist" has made the need for such a work more pressing, for current attempts to interpret Schmitt as a Christian political theologian tend to cast his Hobbesian components in the rather narrow framework of the necessity to reestablish the natural "unity of religion and politics."[10] There is, however, a much broader and more fundamental relation between Schmitt and Hobbes that calls for a comprehensive exploration.

Joseph W. Bendersky

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8. In light of the severe criticism of Schmitt's stance regarding Jews by scholars like Stephen Holmes, *The Anatomy of Antiliberalism* (Cambridge, Mass.: Harvard University Press, 1993), pp. 50-53, and Raphael Gross, "Carl Schmitts 'Nomos' und die 'Juden'," *Merkur*, Heft 5 (May 5, 1993), pp. 410-420, these issues need further attention. Although Schwab addresses some of their criticism in his footnotes, more elaboration is clearly necessary to deal adequately with the alternative interpretations.

9. Helmut Rumpf, *Carl Schmitt und Thomas Hobbes: Ideelle Beziehungen und aktuelle Bedeutung mit einer Abhandlung über: Die Frühschriften Carl Schmitts* (Berlin: Duncker & Humblot, 1972). Gershon Weiler *From Absolutism to Totalitarianism, Carl Schmitt on Thomas Hobbes* (Durango, Colo.: Hollowbrook Press, 1994).

10. See my forthcoming review in *Journal of Modern History* of Andreas Koenen, *Der Fall Carl Schmitt: Sein Aufstieg zum "Kronjuristen des Dritten Reiches"* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1995) and Heinrich Meier, *Carl Schmitt and Leo Strauss: The Hidden Dialogue*, trans. J. Harvey Lomax (Chicago: University of Chicago Press, 1995). The recent article by Wolfgang Palaver not only interpreting Schmitt as essentially a Christian thinker but linking "Anti-Semitism and territoriality" to Schmitt's political theology in the context of the "Katechon Restraining the Antichrist" reinforces the necessity of reconciling such claims with the extensive and deeply rooted Hobbesian aspects of Schmitt's much more concretely-oriented and realistic political and legal thought. See "Carl Schmitt on *Nomos* and Space," and the response by Gary Ulmen, "Schmitt as a Scapegoat: Reply to Palaver," in *Telos* 106 (Winter 1996), pp. 105-138. The review article by Mark Lilla also reflects an uncritical complete embrace of the "theological twist." The appearance of Lilla's polemical piece bolsters my point even further on the need to confront these issues more directly and thoroughly. In fact, he forces the issue rather dramatically by mercilessly characterizing Schmitt as an anti-liberal, anti-Semitic visionary of "theological despair." See "The Enemy of Liberalism," *The New York Review of Books*, Vol. XLIV, No. 8 (May 15, 1997), pp. 38-44.

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Goldhagen's Germany

Russell A. Berman

Neither reports nor images of German violence are new. On the contrary, there is an ancient tradition of such accounts that dwell on strife and carnage: ". . . it is shocking and disgraceful for all of one's life to have survived one's chieftain and left the battle," writes Tacitus of the warrior people of the North. For those Germans, "the wherewithal for generosity is obtained through wars and plunder, nor would one as easily persuade them to plow the earth or await the yearly crop as to challenge the enemy and earn wounds; nay, on the contrary, it seems slothful and lazy to gain by sweat what one could win by blood."[1] Not very comfortable neighbors, those ordinary Germans, so much more at home with the sword than with the plowshare: what they lacked in agricultural finesse, they made up with soldierly prowess. Could it already have been a belated nation that early? The Roman historian alternates between a fascination with the aesthetic spectacle of their violence and anxious apprehension regarding the threat lurking across the Rhine. He delights in reports of their internecine battles (he appreciates their willingness to kill each other), but shudders when recounting successful resistance to the Empire.[2]

1. Tacitus, *Agricola, Germany, and Dialogue on Orators*, tr. by Herbert W. Benario (Norman & London: University of Oklahoma Press, 1991), p. 70.

2. In paragraph 33, Tacitus describes a battle among German tribes: "More than sixty thousand fell, not by the arms and weapons of the Romans, but, more magnificent still, to delight our eyes. Let there continue and endure, I pray, among foreign peoples, if not affection for us, at least hatred for one another, since, as the destiny of empire drives us on, fortune can furnish us nothing greater than the discord of the enemy" (p. 80). Here violence is perceived as pleasurable, since it is consistent with Roman foreign policy objectives. Yet, barely a page later, Tacitus bemoans the Germans' military achievements and their ability to stand their own against Roman legions. He sees no greater threat to Rome than "the liberty of the Germans" (p. 82).

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How should Tacitus be read? His claims may be taken as ethnographic documentation of the lives of those distant Germans, matching it up with other accounts and artifacts as the evidence for historical studies of the ancient world. Alternatively, the terms of his ethnography might be taken as a catalogue of tropes that appear and reappear in the subsequent discourse on Germany — an ongoing discourse whose terms are constantly reproduced: violent Germany. Of course, there are problems with going that far back. Presentists consider themselves generously historical when they reach back to the Reformation, or even just to the 18th century. Yet with each generation, there is a loss of historical depth. Moreover, the subfields devoted to earlier periods are understood as separated enclaves, which might as well be involved with other countries or planets. What is lost is the possibility of imagining large historical expanses, continuities, and traditions. This loss of memory, which accompanies modernity, accelerates through images of violence: Hitler and the Holocaust loom ever larger, casting an ever thicker shadow over the rest of historical experience, as the Nazi identification of Hitler with Germany is realized by the imagination that represents Germany, German culture and history, culminating in Hitler.[3] The 20th century violence of the Holocaust has such a magnetic pull that it may be eroding any more extensive historic consciousness, and it therefore promotes a presentist amnesia, undermining memory, including the memory of the Holocaust itself.

Historical consciousness is mediated across generations: as a student in Bonn, the young Heine studied Tacitus within the context of the political romanticism of the years following the defeat of Napoleon — what more classical documentation of the German claim to nationhood could one find than the testimony of the venerable historian? — and it is no surprise that Roman allusions recur throughout Heine's verse, including the famous passage in his *Germany: A Winter's Tale:*

> This is the forest of Teutoburger
> Which Tacitus travelogued in;
> This is the classic muddy swamp
> That Varus' legions got bogged in.[4]

The poem's point of reference is still the warrior nation and the violent

3. See David Gross, *The Past in Ruins: Tradition and the Critique of Modernity*, (Amherst: University of Massachusetts Press, 1992).

4. Hal Draper, *The Complete Poems of Heinrich Heine: A Modern English Version* (Boston: Suhkamp/Insel, 1982), p. 502.

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battle between Roman legions and Germanic tribes. But in 1843 Heine breaks the celebration of soldierly strength and barbarian bloodlust with an ironic rhetoric of immobility ("got bogged in" for "*stecken geblieben*") and the subsequent (and for Heine quite characteristic) juxtaposition of heroic aspirations and mundane location:

> Here they fought the Chersucan chief,
> Great Hermann, our noble sire;
> The German nation rose in triumph
> Out of this muck and mire.[5]

Heine engages with Tacitus' account, but he does so within the context of early 19th century romantic nationalism, attempting to define his own position on German nationhood, in competition with conservatives of various ilks as well as the growing radicalism of the Parisian exiles, including the young Marx. Yet more than that *Vormärz* discussion, it is the situation of cross-generational intertextuality, which may help in present efforts to understand Germany. For like Tacitus (who probably relied on Pliny's reports), and Heine, the reader of Tacitus, today's scholars also inherit a surfeit of accounts and images (especially of German violence), and it is important to think through the impact of these representations on explanatory efforts and on addressees.

Of course, one might begin by wondering if particular images predominate simply because they are correct. Such an objectivist approach locates truth in a real world of hard facts, assumed to be approximately reproduced in the narratives about them: there are images of German violence because that is what Germany is about.[6] Yet, in the current intellectual climate, much more attention is paid to discourse, ideology and

5. *Ibid.*

6. Alternatively, one might suggest that "what Germany is about" is — not violence, as in the Tacitus legacy — but about reflections on Rome, i.e., Germany's self-understanding depending on its relation to Italy: Holy Roman Empire, Luther's polemics, Winckelmann and Goethe, the discourse on Italy during German unification, George's Algabal and Porta Nigra, Roman elements in Nazi architecture, etc. The question here is different: does this amount to evidence of a tradition partially constitutive of German identity? If the answer is yes, then one is not working merely with representations but with sedimentations of historical experience accessible only through texts and their interpretations but more real than simple textual constructions. On the Roman question in German unification, see my *Cultural Studies of Modern Germany: History, Representation, and Nationhood* (Madison: University of Wisconsin Press: 1993), pp. 73-88; on Roman architecture in the Nazi culture, see Timothy Donahue-Bombosch, "Constructing the Nation: Fascist Representations of Work in Germany, 1918-1937" Dissertation. Stanford, 1997.

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mentalities, and such culturalist accounts allow for varying degrees of skepticism toward any invocation of empirical facticity: this may make proof difficult. The culturalist knows well that access to history takes place only through texts: hence the interest in images or representations of violence. Yet the constant recurrence precisely to such qualifying terms as "images" and "representations" betrays an unwillingness to accept the testimonies as authentic evidence or proof. To speak of representations and images of violence is nearly equivalent to insisting on "assertions of" violence, or "allegations" or even "simulations," perhaps even "fabrications," "hallucinations" or false memories: life is always kept at arm's length, since culturalism constantly withholds belief. No assertion of violence can claim objective truth. Objectivism and culturalism are each only half the story, because in today's world of both facts and interpretations the difficult task remains to explain beliefs with reference to contexts, without reducing one to the other.

Heine grapples with precisely this problem in "Night Thoughts," the topic of which is how to think about Germany, "*Denk ich an Deutschland in der Nacht*," to cite the famous first verse. The distance between the Parisian setting of the poem and the German reminiscences in fact makes the problem even more explicit, since it is Germany as topic and not as location which becomes the speaker's concern. Of course, the poem shifts abruptly from the presumably political reference in the opening to the personal realm in the third verse, which recalls the poet's aging mother (critics have debated whether it should be read primarily as a public or as a private document of exile). The poem, however, functions in an altogether different way: not as a political or personal confession, but as a staging of an obsessive worrying about Germany — a worrying that the poem identifies, examines and criticizes. "When I think of Germany," the poem begins, "I display the following disturbing symptoms: what is the source of the German worries?"

"I lie awake and sleep takes flight," the poem continues: recall how Heine plunges the insomniac of the poem into a tearful depression, as his worries about his mother grow from one stanza to the next.[7] Yet there are plenty of hints that this filial devotion is not quite proper: the mother turns out to be a sorceress who has bewitched her son, perhaps even a lugubrious variant of the fatal Lorelei figure of the earlier *Heimkehr* poem, as a subtle allusion suggests. Meanwhile, the nocturnal melancholy grows into an anxiety

7. Draper, *op. cit.*, p. 407.

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about victorious death — "As if the dead host pressed unknowing/Upon my breast . . ." — until suddenly his beautiful wife arrives with the rescuing light of morning, as enlightened France banishes romantic German worries.

Of course, the lyric expression of those worries is quite vivid, while the concluding stanza may be somewhat less compelling, but the poem's project remains clear: an inquiry into the dynamic of worry, of worrying excessively about Germany. Therefore, it can serve as an entry into the discussion about Daniel Goldhagen's *Hitler's Willing Executioners*. This is not the place to address some strictly historiographical topics, e.g., the conflicts with Browning and Hilberg; important issues best left to professional historians. Goldhagen, however, also makes a very emphatic claim about a large swath of German culture. Indeed, this is the crux of his argument — a claim that found considerable public, if not professional, resonance. That his misrepresentation could ring so true to so many ought to concern everyone engaged in understanding Germany.

Why do good things happen to bad books? In this case, a bait-and-switch strategy must have helped; in other words, the glaring disjunction between the argument and the content. Goldhagen's goal is to answer the question of how the Holocaust could happen by claiming that German culture was virulently anti-Semitic long before 1933. Yet the book gives relatively short shrift to any investigation of culture or pre-Nazi history, dwelling instead for most of its pages on the real violence in which the "ordinary Germans" of the Nazi era participated. The descriptions of the killings, sometimes quite graphic, lend the book a literary and photographic power, but say nothing about the specific motivations of the culprits. Because he dismisses all other explanations, Goldhagen simply surmises that it was their "culture" that made them do it. But that is far from convincing proof.[8]

This is the claim that demands close examination. For Goldhagen, anti-Semitism is a function of Christianity, which he attempts to demonstrate with a few familiar citations from John Chrysostom. Yet he avoids any more complex discussion of anti-Semitism in pagan antiquity, just as he leaves the treatment of Christianity unnuanced, i.e., according to him there is evidently nothing in Christianity that might modify anti-Semitism.[9] On

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8. Among others, Omar Bartov has pointed out how thin Goldhagen's real discussion of German culture is. See his "Ganz normale Monster," in Julius H. Schoeps, ed., *Ein Volk von Mordern?* (Hamburg: Hoffman and Campe, 1996), p. 69. Originally in *The New Republic* (April 29, 1996).

9. Daniel Jonah Goldhagen, *Hitler's Willing Exzecutioners: Ordinary Germans and the Holocaust* (New York: Alfred A. Knopf, 1996), pp. 50-51.

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the contrary, the anti-Semitic Church could become "totalitarian" (his term) in the Middle Ages (pp. 52-53), and Germany would then inherit, modernize and racialize this legacy. In other words, from the start, from the medieval period or even antiquity, German culture is seen to be pervasively and constitutively anti-Semitic. To be German, according to Goldhagen, meant being anti-Semitic, which is why he sees the "German national project" (p. 11) as, by definition, associated with the elimination of Jews. Anti-Semitism is not some extremist position which, in a particular historical context, was able to seize power; nor is it just one of various strands in German national culture. Goldhagen's precise claim is that anti-Semitism, indeed eliminationist anti-Semitism, was the defining feature of German culture since the spread of Christianity among the tribes described by Tacitus.[10]

Nothing here is right. If the "national project" depended on anti-Semitism, then one would expect to find it associated with the key events of nationhood: 1848, 1871, 1914. Yet German Jews could participate in all of them comfortably. Perhaps they were deluded, those foolish German Jews, but to prove his claim Goldhagen would have to provide evidence: anti-Semitic tirades in the Paulskirche or the Hall of Mirrors or in WWI mobilization. Of course, he provides nothing of the sort. Nor is there any discussion of any significant German culture — no Goethe, no Schiller, no Heine, no Nietzsche, not a single footnote or index reference — to prove German culture's eliminationist character. Evidently, one sentence from Thomas Mann and one from Martin Niemöller suffice to characterize and then condemn the entire cultural legacy.

Perhaps Goldhagen means to suggest that high culture is irrelevant. But if one follows the argument, it becomes clear how, from the outset, he insists on taking the stance of an "anthropologist" (p.15) and therefore thinks of culture as the collection of "beliefs and values" (p. 23), a "mindset" (p. 25), or "unquestioned norms" (p. 29). He never tries to sort out what these sundry terms might mean — if there are "unquestioned

10. Herbert Lehnert misrepresents Goldhagen's claims when he writes that: "Goldhagen tries to describe Nazi-era German culture as if it were on a particular path (*Sonderweg*), as if it had abandoned the cultural understandings of Christianity and Enlightenment." See his "Was Wir von Goldhagen lernen können," in *German Quarterly*, Vol. 70, No. 1 (Winter 1997) p. 57. On the contrary, Goldhagen's argument is that eliminationist anti-Semitism derives, not departs from Christianity. He is therefore a bit inconsistent when, later in the book, he complains that German church leaders did not oppose Hitler. It is unclear why Goldhagen, given his genealogy of anti-Semitism, should expect anything else. Similarly, Goldhagen has nothing positive to say about the Enlightenment; the one figure he dwells on is Dohm, whom he reads as an anti-Semite in liberal clothing.

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norms," are there also "questioned norms," or does culture imply that questions are disallowed? etc. — and the casual addition of the "Durkheimian collective consciousness" (p. 89) muddles things even more. Goldhagen evidently believes that, as an anthropologist, he could see his way through this conceptual mess by deploying a broad-brush understanding of culture that quickly disallows any room for dissent: "When beliefs and images are uncontested or are even just dominant within a given society, individuals typically come to accept them as self-evident truths. . . . An individual learns the cognitive models of his culture, like grammar, surely and effortlessly" (p. 46). With this approach, however, Goldhagen is methodologically predestined to claim that whatever feature characterizes a given culture, said feature will necessarily be found to be pervasive and largely unchanging: culture is the dimension of permanence and conformism, i.e., according to Goldhagen there can be no significant difference within any culture. Hence, German anti-Semitism turns out to be quite old (since cultural norms never really change); and the eliminationist mind-set pertains to real killers as well to all the others who just did not have the opportunity to participate (p. 402), since everyone shares the same values and would be prepared to act on them in the same ordinary way. Of course, this hopelessly blurs the difference between real criminals and anyone else: whether one killed or did not does not count as long as one was German, which means one wanted to kill: one is guilty because one is German (which means that one is necessarily an eliminationist anti-Semite), and not because of what one did or did not do or think.

As flawed as the book may be, it has been a success with a public — one presumably not schooled on Tacitus but fascinated nevertheless with images of German violence and quite prepared to view all of German culture (before 1945) as murderous. How did Hitler happen in the country of Goethe and Schiller? Goldhagen answers by dropping Goethe and Schiller out of the picture. He uses an opportune quote from this or that intellectual when it suits his purpose, but he never demonstrates any serious engagement with a complex thinker. Of course, in the context of a scholarly argument that culminates in a blanket denunciation of a culture, this is disappointing. It is not surprising, however, that the public does not mind. This is a time of revolt against high culture, so its absence in the discussion of the eliminationist thesis — even though it is specifically about culture — is not noticed.

Nevertheless, the inculpation of German "culture" has a plausibility which might not work elsewhere. Thus an account of Soviet Communism primarily in terms of Russian culture would not get very far, just

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as the rash of claims about Asian or Confucian capitalism have come and gone rather quickly. In contrast, it remains strangely feasible to explain German deeds in terms of German culture, and this readiness may be, in part, a specific phenomenon whereby the early 20th century identification of German imperialism with *Kultur* continues to reverberate in a late 20th century low-culture redefinition. In other words, the link between politics and culture may have been forged long ago (perhaps in August 1914), and what is taking place today is merely the displacement of one cultural paradigm with another, while the connection to politics remains constant.

Yet the overriding political meaning of the fascination with representations of violent Germans is the role they play in American ideology. Every invocation of German evil reassures Americans that the US has, shades of Tacitus, an imperial mission. Hitler must be stopped, even if his name is Saddam, just as Chamberlain's Munich became the master metaphor for foreign policy. (There may well have been reasons to wage the Gulf War, but probably not because Iraq was Germany or Kuwait Czechoslovakia). Yet a second lesson emerges simultaneously: however global American aspirations must be, in order to resist the violent Germans and their clones, the American aspirations are always liberal and good, in contrast, again, to Germans who are either actively brutal or eager to follow orders, in a way American citizens presumably would not.[11] This popular-cultural imagery of Germany remains the underside of the Wilsonian legacy, which defines the bipartisan consensus on the American mission, while the inability to cultivate a nuanced understanding of the adversary

11. In the December 27, 1971 edition of the *Harvard Crimson*, it was reported that "two Harvard social psychologists present a study that shows that more than half the American people, if given orders to shoot all inhabitants of a Vietnamese village suspected of aiding the enemy, would follow the orders." See the *Harvard Crimson*, June 3, 1997, p. B-2. The notion that Americans might follow murderous orders might relativize the willingness to complain that Germans follow orders too easily. The Harvard example, however, is more than twenty years old, from Vietnam era debates. What about today? The August 28, 1997 edition of the *New York Times* editorialized that the Berlin conviction of former East German officials, including Egon Krenz, were "legally questionable" because they punished "people for acts that were not criminal when committed," i.e., they were obeying orders. Pulling back from an explicit condemnation of the verdicts, the *Times* nevertheless upholds the principle that obedience to the law, no matter what its content, has priority over individual moral judgement. It allows for an exception in the case of genocide, but this still means that "just following orders" is the right thing to do in almost all instances. This would then leave liberalism without its favored image of the excessively obedient German, since, at least according to the *Times*, obedience is a *desideratum*, even if it means shooting at individuals trying to cross a border.

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in two world wars reflects poorly on the ethics of the victor.[12]

Finally, the reception of Goldhagen's book, in Germany and in the US, entails a dramatic rejection of established scholarship by the reading public. The scenes of the open fora in Germany have been well reported here, while in the US the doubts expressed by esteemed academic historians did not appear to win the day with the readership.[13] This may mean that Goldhagen provided something which other scholarship has withheld. What the book does in fact offer its public is a large dose of existential reassurance — especially reassurance that the Holocaust can fit into a comprehensible world where intention, action and outcome all converge. Even Elie Wiesel, otherwise supportive of the book, distanced himself from it by insisting that Goldhagen's thesis is unable to recognize an ultimately inexplicable dimension to the Holocaust.[14] For Goldhagen appears to eliminate the mystery, offering perhaps the ultimate normalization: individuals shooting individuals because they wanted to, instead of the erstwhile enigma of industrialized

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12. Missing the scope of Goldhagen's blanket condemnation of German culture, Lehnert tries to assimilate him to the standard complaint that Germans were not liberal enough and, no doubt, the book is consistent with if not identical to that claim, i.e., it will confirm liberal preconceptions about authoritarian Germany, although Goldhagen does not really make the authoritarian argument (since they were "willing" after all). Nevertheless, Lehnert glosses the book with his own agenda that makes every critic of liberalism a forerunner of Hitler: "Anti-liberal ideological tendencies and currents were widespread in German literature before 1914: one need only think of the works of Stefan George, the prophetic voice in German expressionist poetry, Heinrich Mann's call for the author as leader, or Musil's 'other state.' Anti-liberal, pseudo-religious tendencies are found in Leninism, in the *Dialectic of Enlightenment*, and in anti-communism" (p. 63). While he proceeds to hedge his claims, he has in fact mirrored Goldhagen's denunciation of German culture's constitutive anti-Semitism with his own broad-brush attack on anti-liberalism. This allows him to score points against arbitrary opponents, who can hardly be seen as participants in Nazism: George, Heinrich Mann, Horkheimer and Adorno. The underlying presumption that liberalism is somehow immune to anti-Semitism remains to be proven: the vicissitudes of Austrian liberalism in recent decades might be taken as quite a different case. More importantly, it would be worth inquiring into how Enlightenment anti-clericalism (Voltaire!) and liberal insistence on the separation of church and state may have contributed to a hostility to religion that burgeoned into an anti-Semitism which redefined itself as "scientific racism." Again, the Austrian case is worth considering where, due precisely to the Austro-fascist interlude and the ascendancy of the Christian Socialists, the Nazis came to power with a strong anti-clerical bias. Is the liberal hostility to religion a source of anti-Semitism?

13. See Amos Elon, "The Antagonist as Liberator," in *New York Times Magazine* (January 26, 1997), pp. 40-44.

14. Elie Wiesel, "Little Hitlers," in *Schoeps*, p. 47. Originally in *The Observer* (March 31, 1996).

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killings.[15] It was all so simple and all so German. So not to worry, it cannot happen here. In addition, of course, Goldhagen reconfirms the prejudices of the American public about Germany, and he provides today's Germans with a blanket exculpation, separating them absolutely from the pre-1945 world. The represented violence, which appeared to be so disturbing, fits ultimately into a psychology as safe and conformist as his understanding of culture.

Yet, if the book's success depended, at least in part, on recycling images as old as Tacitus and confirming prejudices — everything one always knew about Germans — then another American worry arises: does scholarly labor have any prospect of educating the broader public and correcting prejudice? Does any study of another culture have a chance at modifying the national self-images, replete with global ideology? Perhaps the one positive accomplishment of the book is that by eliciting such acclaim, it has demonstrated how large a task remains.

15. The core of the "willing executioner" claim is, of course, that Germans wanted to kill Jews because of their commitment to an eliminationist anti-Semitism. Goldhagen contrasts his model with that of Raul Hilberg and others who try to explain how perpetrators overcame moral scruples; Goldhagen insists they had none, i.e., they were "willing executioners," (p. 385). They were neither authoritarian Germans who "just followed orders," nor were they the banal functionaries portrayed by Hannah Arendt. Given the centrality of this claim, it is odd to find the term translated in the title of the German version as "*willige Vollstrecker*," which means "willing executor," as if ordinary Germans were carrying out, i.e., "executing" Hitler's will. But this would push the whole argument back toward Arendt's Eichmann: just following orders. Of course, "executioner" also has the additional meaning of carrying out an order, but that is surely less obvious than its meaning as hangman, and given Goldhagen's insistence on the eliminationist project, that would have been the proper meaning to convey. "*Willige Henker*" might have been a more accurate title that would not have softened the message. The German reception of the book evidently passed through an initial phase of hostile rejection to a second phase of mass acclaim. Could this be explained in part by the shift in title? The early reception was based on the English-language volume; the mass reception followed the German publication, with a title not incompatible with a just-following-orders paradigm. Of course, more important is the shift in the composition of the public: from a public, presumably largely scholarly, able to read English and willing to order a book from abroad, to the larger German-reading public.

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Canadian Federalism: The Decline and Fall of Quebec Separatism

Frederick Johnstone

Global model or global failure? That is the Canadian question. Canadian federalism seems to be a successful compromise between today's opposing forces: capitalism and socialism, centralism and localism, globalism and sovereignty, pluralism and ethnocentrism. The UN ranks Canada at the top of its development index. Yet the close result of the 1995 referendum in Quebec has raised once again the question of the possible break-up of Canada. The US Congress listens to earnest lectures about the coming chaos, and Canadians get a strange case of Mad-Canada Disease, as an otherwise healthy body-politic begins to faint and fall from eating the offal of its own bad news, while the rest of the world looks on and does not understand. Quebec separatists cling to the stale victimology of "oppressive federalism." But foreign journalists are not so sure. If Canada is oppressive, then perhaps words have lost their meaning, they conclude, as they head back to Bosnia, Chechnya, Rwanda — and Padania.[1]

If the rest of the world does look on, that may be because, as Paul Piccone points out, the Canadian case is indeed of global significance.[2] What has happened? Is Canada a terminal case of sick federalism teetering on the edge of collapse, or can it be argued that what is in trouble now is not

1. Where they hear Carlo Corti, foreign-affairs spokesman for Italy's separatist Northern League, declare, in September 1996, that "I would be very, very happy if tomorrow Padania had the same powers as Quebec. That would be almost paradise for us." See Madelaine Drohan, "Padania Aims to Separate from Italy," in *Globe and Mail* (Sept. 14, 1996), p. 10.

2. Paul Piccone, "Secession or Reform? The Case of Canada," in *Telos* 106 (Winter 1996), pp. 15-63.

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Canada but Quebec? Canadian federalism is in devolution, but Quebec separatism is in disarray. To understand this, it is necessary to counter the hysterical misinterpretation of the 1995 vote. This may pave the way for a wider discussion of the resilience of Canadian federalism and of the unfolding crisis of Quebec separatism, which does not have any chance of taking the whole of Quebec out of Canada. When all is said and done, Canada remains a viable example of peaceful coexistence and balanced development. If the current mix of pragmatic devolution and social democracy continues, Canadian federalism may well emerge as the prototype of a humane but efficient 21st century state, somewhere between the two poles of American social Darwinism and Europe's entropic statism.[3]

The 1995 Quebec Referendum

The 1995 referendum was called by the separatist *Parti Quebecois* (PQ), which had won the 1994 provincial election. Quebeckers were asked if they supported sovereignty-association (independence plus an offer of association with Canada). They voted 50.6% "no." But this close result is deceptive: there is no big new surge of separatism in Quebec. Without going into details, a few points may explain why. First, the PQ victory was hardly the landslide that pundits had predicted; if anything, it was the opposite. The federalist Liberals actually tied the PQ in the popular vote (about 45% each). Moreover, despite all the hype and hysteria about "the separatists coming to power," there was nothing very special about the PQ victory. It was a normal swing of the pendulum. The PQ has been voted in (and out) before. The election itself was not about separation. As polls clearly showed, what most voters wanted was a change of government and the main alternative to the Liberals in Quebec is the PQ. Second, the referendum was no separatist landslide. The PQ knew its electoral support was deceptive, which is why it hardly mentioned separatism before the election. It only hoped the power of government would boost its cause. This did not happen, and the promised referendum looked more and more like political suicide. The only alternative was to fudge the question.

3. The enigma of Canada is reflected in the variety of labels, with Richard Gwyn calling it "the world's first post-modern state," and Richard Rodrigues defining Canada as "the largest country in the world that does not exist." See Richard Gwyn, *Nationalism without Walls: The Unbearable Lightness of Being Canadian* (Toronto: McLelland and Stewart, 1995), pp. 244 and 248. For some recent alarm bells, see Robert Lecker, "The Writing's on the Wall," in *Saturday Night* (July/August 1996); and Charles Doran, "Will Canada Unravel?" in *Foreign Affairs* (September/October 1996). The subtitle of Lecker's article is: "Things are not getting better in Quebec. They are getting worse, and fast. Chaos, terrorism and violence are now a safe bet."

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This in turn reflects a basic fact: separation has never been very popular in Quebec. That has always been the Achilles' heel of Quebec separatism, and that is why, last time around, in the 1980 referendum, the PQ fudged the issue with "sovereignty-association." This is a vote-catching idea of having the best of both worlds by being in and out of Canada at the same time. It was invented by the PQ leader René Levesque when he realized he could not win a separatist referendum. Yet even this soft option failed to win more than 40% of the vote.

In 1995 it re-surfaced once again. Faced with the continuing unpopularity of separation, the PQ once again fudged the issue, replacing the straight quit-*or*-stay vote it had promised with another convoluted quit-*and*-stay question. This was the price it had to pay for a vote-getting tactical alliance with a small, soft-nationalist splinter group (the *Action Democratique*), which wanted the benefits of separating without actually separating or, according to a popular Canadian joke, "an independent Quebec within a united Canada." Under the new formula, sovereignty would include an offer of association but not depend on Canada's acceptance of it. The association idea tapped into soft nationalists' naive fantasies about separatism without separation. Yet the Leninist logic of the PQ leaders was clear: the deal meant sovereignty with or without association. People foolish enough to misunderstand this would deserve their fate. They would be "cooked lobsters," as PQ leader Jacques Parizeau put it, in some off-the-cuff (and supposedly off-the-record) remarks to foreign ambassadors.

Politics may well be the art of the possible, but all this back-tracking was only a sign of disarray. Fudging the issue sabotages the separatist project both in principle (by retaining a Canadian link that contradicts Quebec sovereignty) and in practice (by requiring a Canadian consent that would not be forthcoming). For even if the PQ were to gain a slim majority for such an option, it would not mean anything because the PQ would then come to an empty negotiating table. Ottawa would simply tell it to go and have a real quit-or-stay vote (and would also spell out Canada's own tough terms about what quit would mean for Quebec). This is precisely what Ottawa is doing now, with Prime Minister Jean Chretien's good cop/bad cop routine of Plan A and Plan B. Plan A is some continuing accommodation of Quebec as part of a renewed federalism, symmetrical devolution and incremental (rather than constitutional) change. But Plan B is a pre-emptive strike against Quebec unilateralism and PQ fudging, as symbolized by Ottawa's referral of the secession issue to the Supreme Court.

In what was a distinctly new message from Ottawa, Justice Minister

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Allan Rock said that only a straight question would be taken seriously, and that Quebec voters should know ahead of time that Ottawa would not negotiate any partnership deal. The straight question, however, is something Quebeckers have always avoided. Many prefer to complain about Canada (while enjoying its benefits) rather than leave it altogether, and to use separatist politics to lever more federal transfers to Quebec. That old game is ending now, because the other side is sick of playing it. The failure of recent attempts at constitutional reform (the Meech Lake and Charlottetown Accords) has produced a tough new mood of take-it-or-leave-it realism in the rest of Canada. Plan B calls the bluff and sends the ball in Quebec's court (where, paradoxically, most Quebeckers do not want it).

Despite bad omens, PQ leader Jacques Parizeau stuck to his guns, and the referendum went ahead. The PQ campaign went from bad to worse and was clearly heading for a humiliating defeat (something which seems to be largely forgotten now). What saved the day was the replacement of Parizeau by Lucien Bouchard, the leader of the *Bloc Quebecois* (the federal wing of the Quebec separatists). More pragmatic than Parizeau, Bouchard insisted on the association-type question and on a tactical alliance with non-separatists. More charismatic than Parizeau, Bouchard upped the ante in campaign rhetoric and played the ace of ethnic nationalism. He countered the mundane federalist politics of fear with a demagogic politics of pride. The crowds loved it.

Unfortunately for the separatists, this does not say much for their cause. This "Bouchard factor" cannot easily be repeated, especially now that he is Premier of Quebec. As Levesque, his equally popular and charismatic predecessor, quickly found out, this means having to make unpopular decisions (about things such as Quebec's huge deficit and bloated public sector), and realizing that pragmatic politics cannot be reconciled with the hard-liners' absolutist agenda. This "Bouchard decline" is now even more likely due to his main decisions as Premier: making the economy rather than sovereignty the top priority (which makes him sound like the pragmatic Liberals and accentuates the contradictions generated by the separatism-linked economic decline of Quebec); postponing another referendum until after the next election (which increases re-election options for the Liberals, as had already happened when Bourassa and the Liberals were re-elected and the supposedly undefeatable Levesque was dumped); and pushing three main policies (social cutbacks, language moderation and partnership ideas) which contradict the PQ's social democratic, unilingual and separatist platform, thus antagonizing the hard-liners. Not surprisingly,

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the PQ convention in November 1996 nearly fell apart and in October separatists actually burned Bouchard's effigy in the streets.

Finally, the vote itself was not as close as it seems. Even with all the fudging and demagogy, the PQ was unable to gain over 50% of the vote and did worse than expected in key ridings (such as East Montreal). More significantly, some of the "yes" vote (somewhere between 10% and 20%) did not mean support for separation but merely a continuation of the old leverage game of soft nationalists who do not actually want to leave Canada and on a straight question would vote "no." The "yes" vote is deceptive because some of it is really a "no." Thus the misunderstanding of the 1995 vote and of polls since then rests on a confusion of support for sovereignty-association (partnership) with support for the unilateral declaration of independence (UDI). The widespread media fixation on "yes" support in the polls is absurd, because it begs the question of yes to what? If people say they want to be in and out of Canada at the same time, so what? Is that news? More newsworthy is the consistently low support (somewhere around 30%) for outright separation. When Quebeckers were asked the straight question (in a July 1996 poll), if they wanted Quebec to "leave Canada and become an independent country," only 28% said "yes."[4] Perhaps the interesting question is why Quebec separatism receives so much attention when so few Quebeckers actually want to leave.

The PQ was thus heading for a major defeat. It only managed to bail out through a fudge question and an opportunistic deal (with the fence-sitters) that would quickly fall apart if any UDI was ever made. This disunity was confirmed by the uproar in May 1997 over Parizeau's new book, which revealed that he would have used a "yes" majority to make a quick UDI. The fact that so many separatists were "shocked" and on the defensive about this proves how "unseparatist" many so-called separatists really are. This is the basic problem of Quebec separatism. It is stuck between a rock and a hard place. It cannot gain majority support for what it wants (independence), but what it might gain (support for partnership) would be vetoed by the rest of Canada.

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4. *Globe and Mail* (September 9, 1997), p. 23. According to an October 1996 poll, a clear majority of Quebeckers would say "no" to sovereignty-without-association. 20% of those who voted "yes" on the 1995 referendum question would say "no" to a question without association. See *Globe and Mail* (October 23, 1996), pp. 1 and 7. On public opinion and separatism in Quebec, see Maurice Pinard, "The Four Phases of the Quebec Independence Movement and their Interpretations," in Douglas Baer, ed., *Political Sociology: An Introduction* (Don Mills: Oxford University Press, forthcoming). No poll has ever shown over 50% support for outright separation.

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The New Dissonance of the Old Victimology

Quebec is not about to leave Canada. This in turn reflects the underlying success both of Canadian federalism and of Quebec nationalism, which has become a victim of its own success as a social movement. Today, there is a strange new dissonance in Quebec politics between the old victimology of Quebec nationalism and the new reality of French power. This is revealed in the pronounced irritability of the French about English and native complaints: only the French are supposed to be victims, even when they now speak in the hegemonic language of power.

Canadian federalism has enabled the French in Quebec (who, unlike native peoples, have majority standing and a cohesive territorial base within an existing Canadian province) to achieve many of their collective goals without leaving Canada. One of the most striking things about Canada today is how much change has actually taken place in Quebec, and how many gains the French have made. Quebec in the 1990s is a world away from Quebec in the 1950s. While this has a lot to do with Quebec politics, it also reflects the viability of the Canadian system. The debate about Canada suffers from hyperconstitutionalism, which misses the point that Canada's "actually existing federalism" is already a *de facto* sovereignty-association, which empowers regions and groups in significant but taken-for-granted ways and can evolve creatively within the legal *status quo*. The convoluted discussion (e.g. Meech Lake) about recognizing Quebec as a distinct society has become distinctly bizarre, because of the many ways Canadian federalism already does precisely that through the powers it gives to the French majority in Quebec. The old victimology blinds many Quebeckers to what outsiders (e.g., Italy's Northern League) can see only too well: real power, major gains.

These powers and gains, however, have weakened the cause. Separatists can no longer count on the old grievances and must resort to the chauvinistic metaphysics of 19th century nationalism (e.g., the "Sacred Borders of the Quebec Nation," as Bouchard puts it, while the Cree and the Mohawks wonder what he is talking about). The political fact that the PQ could not even obtain 50% for a fudge question reflects the social fact that the classic grievances which fuelled Quebec separatism in the past have by and large gone out the window. Nowhere was this clearer in the referendum than in the deafening silence on the language issue. This was a telling clue, because the French language has actually made so many gains that a few years ago the Language Commissioner himself even wondered out loud as to whether it had gone a bit too far and had become

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a human rights problem of discrimination against the English. When the language issue did flare up again, in 1996, it was precisely along these lines, with anglo activists such as Howard Galganov using the same victimological rhetoric francophone militants used in the past (provoking these militants into knee-jerk outbursts increasingly out of touch with the latest polls showing the majority of Quebeckers happy with the language *status quo*). Now the shoe is on the other foot. It is not the same old language fight anymore, because it is not the same old situation. Roles have changed, and French hard-liners (who want a unilingual French Quebec) now face resistance to the hegemonic agenda of French power.[5]

UDI as DOA

Despite all the sound and fury, then, Quebec separatism is now something of a spent force. But what if, as some observers argue, status politics has its own dynamic, regardless of objective grievances, such that progress on the latter may well increase rather than decrease support for sovereignty? While both referendum questions were a fudge, 1995 did receive more support and was more closely tied to a UDI. What if the PQ did receive a slim majority in a fudge vote and then used this as a mandate for a UDI (as Parizeau's book now says might have happened)? This raises another question: even if separatism is not in disarray, it is so fundamentally compromised by its economic and political costs that it has no chance of success. UDI would be DOA (dead-on-arrival).

Many separatists fantasize about some UDI. This, however, is so unlikely as to be hardly worth discussing. Not only do most Quebeckers not actually want that, but even those who flirt with the idea would likely recoil at the enormous price. Indeed, the Quebec economist Marcel Cote has argued that if a Quebec government passed a law declaring UDI, the costs would be so outrageous that a second law would immediately be passed suspending the first. Once the vote-winning fudge of partnership melts in the hard light of day and the PQ finds no one at the table in Ottawa to negotiate with, it is Quebec rather than Ottawa that is stuck with a major problem. Any attempt by Quebec to leave Canada unilaterally would immediately trigger such immense economic and social upheaval within

5. Anglo militants such as Howard Galganov want more English language rights (e.g., English signs), while PQ hard-liners revived the language police (abolished by the Liberal Party in 1993) and push for a unilingual French Quebec, despite the fact that polls show most Quebeckers do not want to go beyond the current law (an Orwellian compromise stipulating that there can be both French and English on signs, as long as the French words are bigger).

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Quebec as to make most voters think twice about going through with it.[6] Instead of the fantasy of a new association in which Quebec retains all the features it likes about Canada, the likely scenario would be the deadlock and stalemate of Plan B. Ottawa would call Quebec's bluff, refuse to negotiate such a deal, set out tough terms for a split, and force the PQ to attempt some kind of unilateral withdrawal. This would be very difficult, costly and unpopular, and would probably lead to the re-election of the Quebec Liberals on a stay-in-Canada platform, which is what is likely to happen anyway, and would not be so different from what has happened in the past.

The same applies to the PQ fantasy of hijacking the entire territory of what is now called Quebec. The political obstacles to a UDI are just as great as the economic costs. The fact is that there are other people in Quebec besides the French and they are not sitting around like quiet church mice. For years Canadians have had to put up with the Orwellian doublethink of Quebec nationalists about the divisibility of Canada but not of Quebec, about self-determination for the French but not for the Cree, about partition for Canada but not for Quebec. Thus Parizeau went around telling Canadians about his plans to split up their country, but then told Quebec's native leaders that "you cannot go around splitting up a country." Bouchard stated bluntly: "The natives in Quebec do not have the right of self-determination. It does not belong to them."[7] But the Cree of northern Quebec have turned the tables on all that, so well in fact that the battle for northern Quebec has already been lost. The First Nations as a whole have made their position so convincingly clear, both inside and outside Canada,

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6. Marcel Cote and David Johnston, *If Quebec Goes: The Real Cost of Separation* (Toronto: Stoddart, 1995), p. 184. Cote says bluntly that independence is impossible. "This proposition is perhaps shocking. But the logic that supports it is unassailable." (p. 194). He sees the taboo on such discussion as a return to the *toi tais toi* (shut up, you) syndrome of the Duplessis years, in which bad news messengers were simply told to shut up. And as far as the benefits of "oppressive federalism" are concerned, here are a few examples: in 1996 Quebec paid 23% of all UIC (unemployment insurance) premiums and received 31% of the benefits; Quebec gets the biggest share of CHST transfers (federal cash payments to the provinces for medicate) — a full 25% above the national per capita average; and with 25% of the population, Quebec farmers get 50% of Canada's milk quota. See *Globe and Mail* (August 18 and August 13, 1997). This list of net benefits could go on, because it is really quite long, not to mention the other list, of independence losses (e.g., the various private sector companies and Head Offices — such as Air Canada — which would immediately leave). The departure of Air Canada alone would be a body blow to the Montreal economy. There is little doubt that a Quebec UDI would be an economic disaster for Quebec.

7. *Canadian Press* (May 25, 1994). See also Wayne A. Hunt, "The First Peoples and the Quebec Question," in *Telos* 108 (Summer 1996), pp. 139-148.

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that the PQ is now on the defensive on the self-determination front, no matter what the colonial fantasies in Quebec City may be. On a practical level, the French would never be able to implement the conquest solution implied by their colonialist claim to the whole of Quebec.

Doublethink and victimology have insulated Quebec nationalists from awkward questions. History, however, has its own momentum and its own reality checks. Elijah Harper kills Meech Lake, Oka explodes, Mohawk Warriors step into the picture, the Assembly of First Nations dumps the Two Nations model of Canada, the Cree defeat Hydro Quebec on Great Whale, and a French mob throwing stones at native women and children is on the evening news. If this were not already bad enough, the PQ is now also on the defensive in the battle for South-Western (mainly anglo) Quebec. The current uproar over the partition of Quebec (in which English groups in the Montreal area do not want to have anything to do with an independent Quebec) again exposes PQ hypocrisy.[8] There is a practical issue here too, i.e., the decline of Montreal, which symbolizes Quebec's wider economic crisis.

Quebec's Economic Crisis

If the disarray of Quebec separatism reflects the historical success of Quebec nationalism and Canadian federalism, as well as the internal costs and contradictions of the separatist project, it is now intensified by an economic crisis, which is itself one of these costs. The Quebec economy is in a mess. Its public finances were already the worst in Canada when the PQ was elected, but Parizeau made things even worse by bribing public sector workers (a traditional PQ base) to stay on his side. Although Bouchard has taken a more neo-conservative line (to placate the bond-rating agencies in New York and win more economic respectability), this

8. By August 1997, a total of 40 Quebec municipalities, representing about 400.000 people in the Montreal and Outaouais (Hull-Ottawa) regions of south-western Quebec, had endorsed Unity Resolutions to stay in Canada if Quebec goes. See *Montreal Gazette* (August 11, 1997). These have been dubbed "partitionist guerrillas" by French newspapers such as *Le Devoir*, which considers this a taboo subject. But taboo or not, the partitionist movement shows no signs of going away, and it is the PQ that is really on the defensive here, in its bizarre attempt to convince the world that if Canada is divisible, Quebec is not. Even Ottawa has now, as part of Plan B, become more aggressive on this issue. The Open Letter to Bouchard, in August 1997, from Stephane Dion (Ottawa minister on the Quebec issue) was unusually assertive in explicitly challenging the double standards of the PQ on democracy and self-determination, and in warning that the current borders of Quebec could in no way be guaranteed in an independent Quebec. See *Globe and Mail* (August 12, 1997).

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will undermine both his and the PQ's popularity. The private sector is also in bad shape (e.g., low investment, capital flight, housing slump). Non-French Quebeckers have been leaving, while foreign investors wonder why anyone would risk a penny in Quebec right now.[9]

Separatism is one of the major causes of Quebec's economic decline. The PQ refuses to concede any such link, with Bouchard himself claiming that "no one can establish any logical link" and blaming the weather.[10] Hardly anyone believes that, and most companies say Quebec politics is bad for business.[11] Yet, for the Quebec economy to become more competitive, the PQ government would have to renege on its social- democratic and separatist policies. This is Bouchard's dilemma and his economic pragmatism only accentuates rather than resolves this disarray. He knows he has to try to reverse Montreal's decline. But that cannot be done with a separatist agenda. So he ends up going to Wall Street bankers pretending not to be a separatist, which blows up in his face when he meets the hard-liners back in Quebec.[12]

Why hide the project? Montreal's decline is yet another reality check. Not only is it impossible to be in and out of Canada at the same time, but talking about it has immediate consequences. Costs do not wait. No one, except the most die-hard separatists, can fail to see that this decline is

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9. The first half of 1996 saw 2% job growth in the rest of Canada but a 5% decline in Quebec; Quebec lost 76,000 jobs in June/July alone — the biggest decline since 1981. See *Globe and Mail* (August 10, 1996), p. 2. Business capital investment in Quebec went down by 4.5% in 1995, and by another 1.5% in 1996, as compared with a 7% increase in Ontario. Although Quebec accounts for 22% of Canada's GDP, it only received 13% of new foreign investment in the first half of 1996. In the 1990s, foreign investment has stagnated in Quebec but doubled in Ontario. See "Report on Business," in *Globe and Mail* (October 19, 1996), pp. B-1 and 3. And this trend continued in 1997: Canada's big investment boom was bypassing Quebec (which was only getting about 5% of the total). See *Statistics Canada* (July 1997).

10. *Montreal Gazette* (Aug. 10, 1996), p. 1.

11. Quebec's economic decline reflects a number of factors. In a recent survey, however, about 75% of business executives and small business owners ranked the political climate as the main problem, whereas less than 10% emphasized other factors such as high taxes and pro-union laws. The latter have only made things worse. Thus, under Quebec's social-democratic corporate tax rules (on income, payroll and capital), Quebec businesses paid $1 billion more than they would have in Ontario. Even a nationalist politician such as Yves Seguin has now conceded: "The probability that we are going to continue to sink into economic weakness increases as long as the government's political project is on the table." See "Report on Business," in *Globe and Mail* (October 19, 1996), pp. B-1 and 3.

12. In October 1996, he held an economic summit to build consensus and reassure investors, while outside in the streets he was being burned in effigy by demonstrators who a year earlier considered him a saint.

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linked to separatist politics. Nothing more clearly symbolizes the costs and contradictions of Quebec separatism than the economic and political crisis of this once grand city. The separatists have been playing with fire, and it is Montrealers who have been burned. Beggars are in the streets. Sooner or later, Bouchard will discover that there is no separatist solution to Montreal's decline. Reversing it means staying in Canada (which is what most Montrealers want); leaving Canada means the ship goes down (die-hards, beggars and all).[13]

The Montreal crisis also symbolizes the wider tension between pluralism and tribalism. Quebec separatism is a quasi-tribal project. It wants a good old fashioned nation-state: a French Canadian ethnic state. Little wonder, then, that the non-French in Quebec do not identify with such a project and that they vote against it. This leads to periodic outbursts of chauvinism, notably on referendum night, when the PQ leaders managed, as one observer put it, to snatch defeat from the jaws of defeat. In a nasty and vindictive speech, Parizeau blamed defeat on "business and the ethnics," and hoped for a future revenge of us (old-stock white French Canadians) against them (anglos and immigrants). Later that evening, one of his cabinet ministers (the Minister of Immigration no less, and Deputy Premier of Quebec) checked into a hotel, leaned over the desk, and cursed all the immigrant staff. Bouchard himself, during the campaign, beseeched Quebec women to have more babies for the sake of "the white race." These episodes reveal the chauvinism not far beneath the surface of much Quebec nationalism, and they seem to vindicate Mordechai Richler's controversial comment of a few years ago: "When I hear French crowds marching through the streets shouting *Le Quebec pour les Quebecois,* I do not think they are referring to people whose last name is Ginsberg."[14] Soft nationalists may dissociate themselves from this embryonic form of ethnic cleansing. It is, however a reminder of the ongoing contest between pluralistic and tribal visions, and of the dilemma facing separatists such as Bouchard, who claim to be pluralists but then claim that "Canada is not a real country." Of course, it

13. Montreal now has one of the highest urban unemployment rates in North America. 20% of the residents of the Island of Montreal are on welfare, and only about 50% of these residents over the age of 15 have a job. See Konrad Yakabuski, "Montreal Gripped by Unemployment Crisis," in *Globe and Mail* (September 17, 1996), p. 2. Quebec's unemployment rate in mid-1997 stood at 11.3%, compared with Ontario's 8.2%. See *Montreal Gazette* (August 14, 1997). Housing starts in Montreal in 1997 were running at about 25% of their 1987 levels. See *Montreal Gazette* (August 15, 1997).

14. Mordechai Richler, *Oh Canada! Oh Quebec!* (Toronto: Penguin, 1992).

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is hard for anglos and immigrants to identify with a French ethnic party — something like expecting Arab voters to support Zionism. The thorny question has to do with who is a true Quebecker: anyone who lives in Quebec (including people called Ginsberg) or just *pur laine* French Canadians (including mothers who have white babies)?

Bouchard's pragmatism tries to placate both sides: the anglo-business world he cannot afford to antagonize and the hard-liners who cannot afford to be pragmatic. That circle, however, cannot be squared, as Levesque learned the hard way when he was attacked by the hard-liners, dumped by the fickle voters, and beaten by the pragmatic Liberals. That may well happen again. Some foresee more drastic outcomes. But this apocalyptic view overestimates both the momentum of separatism and the feasibility of a UDI. Similarly, the much-touted support for partnership is meaningless, since Canada would veto that. If partnership is out and so is UDI, then where is the great Canadian crisis? If there is a crisis, it is that of Quebec separatism, which cannot get what it wants and does not want what it will get. In fact, there may not even be another referendum in Quebec. Even if the PQ is re-elected (which is not a sure thing), it would not call one unless it could win and it will not win on a straight question. But that would be the only viable question (as per Plan B), because the Canadian veto would already be clear. The bottom line is that the straight question cannot be avoided but it cannot be won. It cannot be avoided if secession is the goal, but since it cannot be won, it will be avoided. Therefore, no third referendum is likely.

New Devolutionism and Social Democratic Federalism

Crisis or not, Canadian federalism is now entering a more devolutionary phase. If the referendum does not portend the end of Canada, there has nevertheless been a new turn in the old debate — between symmetrical and asymmetrical federalism (Trudeau centralism vs. special status for Quebec) and toward a third option: symmetrical decentralism. Interestingly enough, after all the constitutional logjams and legalistic discussions, this is an unintended consequence of neo-conservative economics. Government downsizing has come to mean devolution of power. The downloading of costs has legitimated a previously unthinkable downloading of power. If power means costs, who wants it? That is the new paradigm: governments are supposed to be *fiscally* and not just *politically* correct. The federal government has been slashing its deficit and transferring more control but less money to the provinces in a new right-wing magic show

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called "Here is the money, but look who is left holding the bag."[15]

For the federal government, this is a clever way of killing two birds with one stone: deficits and separatism. If Ottawa was more centralist in the past, it could afford it. A more devolutionary agenda (e.g., current initiatives on worker training, tourism, mining, the environment, post-secondary education and native self-government) now serves both economic and political ends. It not only reduces the federal deficit but also undermines Quebec and Western protest. It certainly makes Quebec talk about "oppressive federalism" (such as Bouchard's attempt to blame Quebec's economic crisis on Canada rather than separatism) increasingly bizarre. If the PQ is left tilting at windmills, so is Preston Manning's Reform Party out West. Canadian provinces are not turning into Swiss cantons. In the face of a deficit-slashing devolutionary federalism, however, the politics of Ottawa-bashing becomes more difficult. Always good at outflanking the Left, the versatile Liberal Party is now outflanking both the Right and the regions.[16]

So the expansive 1960s turned into the retrenching 1990s, and the centralist agenda of entitlement statism has been displaced by the devolutionary agenda of enterprise capitalism. The politics of deficit hysteria has channelled populist anger into right-wing reforms, and one of the unanticipated effects of this in Canada is a new devolutionism. Powerful as it may be, however, this global trend is constrained by the social democratic legacy of Canadian federalism. Slash-and-burn economics is resisted by those who seek to defend the historical achievements of the Canadian welfare state against the Americanizing effects of the new Darwinism. For social democratic federalists such as Maude Barlow, the new magic show is a scam, gutting the social fabric and enriching a few at the expense of the

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15. This is symbolized by the Liberal government's 1994 budget, in which the business-oriented Finance Minister Paul Martin took a clear turn to the Right. By 1997, Martin had slashed the deficit in half, and it will likely reach zero within a year or two. In fact, the budget went into a two-month surplus in May/June 1997, for the first time in 25 years. See *Globe and Mail*, "Report on Business" (August 16, 1997), p. B3. The Canadian federal deficit has been cut from about 8% of GDP to 2% in less than four years. See *Globe and Mail* (April 22, 1997).

16. So much for those pundits, who saw the 1993 federal election, in which the Conservatives were wiped out (to just 2 seats) and replaced in Opposition by the Reform Party and the *Bloc Quebecois*, as yet another great Canadian crisis, about the "ungovernability" of Canada. The right-wing Reform and the left-wing BQ basically cancelled each other out, leaving the Liberals virtually unscathed in the center. This panic about the 1993 Canada vote (which echoes the panic about the 1995 Quebec vote) is just another instance in recent years that the prevailing view about the "Canadian crisis" has been wrong.

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rest.[17] What is significant here is that many Canadians actually share that view. What is emerging, in fact, is a centrist rather than a right-wing devolutionism. It attempts to downsize the federal government without abandoning its social democratic mandate. The basic popularity of the Liberal Party reflects its pragmatic understanding of the fact that most Canadians want some balance between the two: downsizing without disentitlement. Not surprisingly, after its recent lurch to the Right, 1997 has seen it doing a lot of Center-Left damage control (e.g., Finance Minister Paul Martin going around talking about child poverty, and Liberal promises of a post-deficit social dividend). Even right-wing parties — not just the Conservative Party under its new leader Jean Charest, but also Manning's Reform Party and the Klein government in Alberta — have moved to the Center-Left on social spending.[18]

This reflects the fact that Canadian political culture is definitely more left-of-center than the US. This is clearly confirmed by recent polls, which show that, while most Canadians are anti-government on economic issues, they are not pro-market on social issues. Indeed, a recent survey found that Canadians are so committed to their medicare system that they would prefer more taxes for it than cuts to it. This clearly illustrates the social democratic side of Canadian federalism, and the profound difference between Canadian and American politics.[19] And this is what hard-line right-wingers (such as David Frum, who keeps deriding the disarray of the Left but whose recent attempt to turn Canada's Conservative Party into a hard-line, American-type Republican Party was a total flop), and decentralist federal-populists (such as Piccone, who rejects the whole idea of Canada's "national standards") fail to understand.[20] Such advocates of unbridled capitalism or extreme devolution are out of touch with Canadian reality. They might reply that Canadians are out of touch with global reality. Canada, however, is doing very well these days in the global economy (so well, in fact, that it is out-performing the other industrial economies in

17. Maude Barlow and Bruce Campbell, *Straight Through the Heart: How the Liberals Abandoned the Just Society* (Toronto: Harper Collins, 1995.)

18. Signs of this left-wing pull on the Right are the Reform Party's campaign (launched in October 1996) promising more spending on health and education; the re-election of the Klein government in Alberta in 1997, based on similar promises; and the Conservative Party's 1997 election plank about a Health Care Guarantee.

19. See the result of a major survey (done for the Finance Department at the end of 1995) in *Globe and Mail* (Aug. 10, 1996).

20. For an incisive overview of income stagnation and polarization in the US, see John Cassidy, "Who Killed the Middle Class," in *The New Yorker* (October 1995).

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most areas, especially exports). So most Canadians are not convinced that being competitive means gutting the social fabric. If anything, it is the other way around: the American formula of anti-social economics just contributes to long-term decline, even if its more flexible labor market means low unemployment and short-term boom.[21] True, the more social European model, with its generous entitlements and rigid labor markets, does lead to the Franco-German syndrome of entropic decline. The pragmatic Canadian mix of economic and social liberalism (e.g., low deficits but free medicare) is somewhere between the two poles of US Darwinism and Euro-statism: a hybrid kind of "social democratic liberalism."

Not seeing this is the basic problem with Piccone's recent discussion of globalism, federalism and Canada. He rightly sees Canadian federalism as a meaningful prototype for transcending the anti-communal bias of modernist Enlightenment statism; and devolutionary reform as a viable alternative to secessionist projects, which would just replicate the same old problems on a smaller scale. But (and not for the first time) he overstates the case for his radical federal-populist critique of left-liberal universalism. His sweeping critique of the modern Western state (as a kind of phoney and therefore unstable nation-state) exaggerates its problems and remains trapped within the nostalgic fallacy of a binary logic which, in its longing for community, simplistically counterposes community against state, regrets the absence of "communal states" and only concedes legitimacy to state forms that "genuinely" express a "people" (a term which pops up uncritically here and there).

The whole idea of a pluralistic state that is not just the voice of one group or region, and of a progressive central government that can do some social good, is given short shrift; and the whole postwar attempt to learn

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21. David Frum, *Dead Right* (New York: Harper Collins, 1994). Frum is disappointed by the Republican betrayal of the Right, just as Barlow/Campbell are offended by the Liberal betrayal of the Left. But Frum is out of touch with Canada's more Center-Left political culture in a way that Barlow and Campbell are not. Frum goes around Canada dismissing the Left as "yesterday's old dog food," but is notably silent on just how unpopular his own position actually is. On the other hand, the left-wing demonization of the Right underestimates the inertial weight of the social-democratic constraints. For despite all the deficit-slashing, the Canadian welfare state is hardly down for the count. While total social spending (by all levels of government) has fallen from a post-war peak of about 13% of GDP in 1993 to about 11% in 1997, this latter figure is still significantly higher than the 1970s avarage of 7.5% and the 1980s avarage of 9.6%. See *Globe and Mail* (August 25, 1997), p. A6. But (just as with British Blairism, and unlike Franco-German statism) the main difference is that liberal reforms have made this level of social spending more economically viable.

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the lesson of Auschwitz by insisting on some universal human rights goes out the window. Indeed, the critique of Piccone's position can perhaps be summed up in three words: localism gone *loco.* More specifically, on the topic at hand, his binary logic (Swiss state or unitary state) ignores the extent to which state differences are more of a continuum than of kind. If Canadian federalism is not as de-centralized as its Swiss counterpart, so what? It is still a long way from a unitary state. Moreover, being less Swiss hardly makes it unviable, especially if one of the reasons it is less Swiss is precisely because of its more social democratic principles (i.e., most Canadians want the kind of medicare system they have and the Swiss do not). Piccone's critique of Canadian centralism understates the autonomy within Canadian federalism (the "Quebec-is-not-Scotland" argument), and his dismissal of national standards is out of touch with the social democratic reality of Canadian political culture. While he is right about devolution as an alternative to secession, he underestimates the social democratic limitations to radical devolutionism in Canada, and the progressive re-distributive role of the Canadian state.[22]

The tension between right-wing devolutionism and social democratic federalism in Canada thus symbolizes the wider contradictions in Western politics today, between anti-tax populism and the social costs of less government. The slash-and-burn economics of the Right intensifies rather than resolves the social anger behind it and sows the seeds of anti-slash backlash. Globalization enables capital to make an end-run around the historical achievements of the welfare state, using the ideology of local empowerment (tax cuts, deregulation, free trade) to legitimate the disempowering effects of the unbridled marketization it promotes. But the human costs of the new nastiness reboot the old politics of social justice. Class-polarizing policies revitalize class politics. The Right remakes the Left. Buying into the idea of government-as-enemy leads people to redis-

22. Piccone, *op. cit.* This is a continuation of an earlier debate (Frederick Johnstone, "Quebeckers, Mohawks and Zulus: Liberal Federalism and Fair Trade," in *Telos* 93, and Paul Piccone, "The Case against Liberal Federalism and Protectionism: Reply to Johnstone," *Telos* 93). The fact that a low-deficit Canada can now afford its welfare state would not be decisive for Piccone, because his critique is not mainly economic to begin with: it is part of a broader dismissal of modern statism as some kind of oppressive bureaucratic centralism (in which fiscal crisis is just part of a deeper cultural crisis of "generalized normlessness" and New Class hegemony). Nor is he impressed by the evident popularity of the Canadian welfare state. Since "national standards" are just code for statism and centralization, the misguided masses must be victims of false consciousness. They should wake up and smell the coffee. Well they have, but they do not like the smell of social Darwinism.

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cover the idea of government-as-friend. Frum sounds convincing until the day comes when you need open heart surgery, and then you are glad if you do not have to sell your house, your shirt, your car and your dog.

In the globalizing 1990s, in Canada as elsewhere, the old class debate between Left and Right is intersecting in new ways with the old federal debate about central and local. What seems to be emerging in Canada, out of these different tensions, is a kind of centrist devolutionism, which accommodates both sides of both debates by decentralizing the system without abandoning the national standards which define it. The Quebec issue is part of this larger four-way process and of the ongoing evolution of Canadian federalism as a balancing act between local sovereignty, national standards, free markets and social justice. How successful this Canadian metamorphosis into a more decentered but not less decent 21st century state will be remains to be seen.[23] For the moment, however, contrary to all the crisis talk, it is Quebec separatism rather than Canadian federalism which is in disarray.

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23. The Canadian election of June 1997 (in which the Liberal Party won a second term, but with a reduced majority) seems to *confirm* the main themes outlined here, about *separatist decline* (the Bloc *Quebecois* did badly); *social democratic constraints* (left-wing backlash in Atlantic Canada, where the NDP made big gains, and left-ward moves by the right-wing parties); and *right-populist decline* (Preston Manning's Reform Party failed to make a national breakthrough, despite moving to the Left on policy issues such as health care, while the conservative vote went instead to the more centrist and "Red Tory" Progressive Conservative Party led by Jean Charest). The latter also moved to the Left with some big health care promises, while the Liberals swept Ontario and even made gains in Quebec. Interestingly enough, the Quebec issue was hardly mentioned. Perhaps the big surprise was that Finance Minister Paul Martin chose not to sweeten the pot with a few tax cuts. This means the Liberals, who now find themselves running one of the best performing economies in the world, will be able to cash in some big 'social dividend' chips in the next few years. In the meantime, the idea that the 1997 election (or the last one in 1993) symbolizes a terminally-divided Canada is not only questionable in fact (given the Liberal Party's fairly broad-based majorities), but also misunderstands (as does the earnest debate about "national unity" more generally) the wider point that Canada is not a system of national unity: it is a federal system of national non-unity. The low level of national unity in places such as Canada and Switzerland is comparable to the low level of peanut butter in cheese: something not altogether remarkable. Has Canada always been a fragmented system? Yes. Does it matter? No. And does fragmentation mean disintegration? No. In fact, the "unifying" social democratic theme of national standards and social justice, of social constraints on social Darwinism, was so strong as to tilt 1997 election politics to the Left.

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Notes and Commentary:

Padania's Virtual Nationalism

Damian Tambini

Support for Italy's Northern League has declined since the movement's 1995 return to a more radical, secessionist stance. But it has not collapsed. Within the movement, moderate reformist members have stepped back and hard-line separatists in Lombardy and Veneto have become more vociferous since the League's recent "declaration of independence" for the region of Northern Italy they have named "Padania." The result has been only a slight decline in the League's share of the vote in the May 11, 1997 local elections.[1] The movement is still the most popular political force in the subalpine areas of Lombardy and Veneto. It is unclear, however, how many League voters support secession as a long term project rather than as a strategic threat to ensure that their demands for reform are met. In the past, the leadership has turned to separatism as a mobilizing ploy before returning to the fold of Italian parliamentary politics. Now, however, it may be more difficult to return to a more moderate stance. As the stable Left coalition push through federal reforms, the League has only one means to differentiate itself from the other parties and continue its occupation of Italian front pages: the threat to secede.

The Northern League's separatist nationalism is often dismissed as mere posture: according to Biorcio, "there was no autonomous Lombard culture grounded on a specific language and particular traditions."[2] Gianfranco Pasquino[3] agrees:

1. Votes in these elections only indicate rough general trends, since voting patterns in local elections do not always reflect national patterns and the communes in which these elections took place are not a perfect sample of the national total. In a sample of 102 communes of more than 15,000 voters, Ministry of the Interior figures indicated that the League vote had declined from 7.6% in 1996 to 6.7% in 1997. Of course, the proportion is much higher in the North, where the League still won in some important towns. It lost Milan, but gained Pordenone, reflecting this general retreat to what Diamanti calls "Pedemontana," the valleys north of Milan. See *Repubblica* (April 29, 1997).

2. Roberto Biorcio, "La Lega come Attore Politico: dal Federalismo al Populismo Regionalistico," in Roberto Mannheimer, ed., *La Lega Lombarda* (Milan: Feltrinelli, 1991).

3. Gianfranco Pasquino, "Meno Partito, Più Lega," in *Polis*, Vol. 3, No. 5 (1991), pp. 33. See also Giorgio Bocca, "Padania: il Paese che non c'è," in *Repubblica* (May 26, 1997); and Ilvo Diamanti, *Il Male del Nord. Lega, Localismo, Secessione* (Milan: Donzanelli Editore, 1996), p. 80.

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"Notwithstanding some clumsy attempts, the League lacks the meaningful cement provided by language and a specific and differentiated culture." Used to delegitimate the movements nationalist claims, these statements presuppose classical nationalist assumptions regarding the nature of legitimate claims for autonomy. They privilege an outmoded, inaccurate nation-state ideal of prepolitical, homogeneous identity and interest. All nationalist movements emphasize and even invent ethnic consciousness — through a combination of historiography, the arts and xenophobia — and at the same time stress the economic gains secession will supposedly bring about. Here the Northern League is in fact no exception. Yet, in other ways, the movement does not fit the conventional model of nationalist secessionism. Indeed, it is unclear what secession can mean, in one of the hubs of the global economy, when advocated by a party committed to European integration and seemingly concerned more with media spectacles than with serious proposals for constitutional reform.

The peculiarity of the League's nationalism may be due to the context in which it has developed, a context which further undermines those classical nationalist assumptions. The institutions through which "national self-determination" claims have emerged during the past century or so have developed when culture began to have a new, central role in society,[4] and the state had a great deal of control over culture through education, the arts and the media. Hence the nation-state. Today, because of technological changes, globalization and postmodernization, the contemporary state no longer has the same relation to culture, and this undermines some of the fundamental sources of its legitimacy. As national homogeneity, national interest and national economies become more difficult to sustain,[5] the need arises for a new set of institutionalized ideas to deal with the continuing emergence of claims for self determination and group rights. This would be a framework in keeping with a new context, especially in Europe, where citizenship and sovereignty are becoming less national,[6] culture and identity more reflexive, fragmented and ironic,[7] and scale is no longer the structuring

4. Ernest Gellner, *Nations and Nationalism* (Oxford: Basil Blackwell, 1983).

5. Nationalism joined myth with an undeniable reality of national homogenization and common interest. The idea of the national economy is a fairly recent construction and corresponds even less with genuine forms of interdependency or homogeneity. See Eric Hobsbawm, *The Age of Extremes. The Short Twentieth Century* (London, Abacus, 1995), p. 108. The breakup of the welfare state has elsewhere been associated with the decline of a fundamental basis for national solidarity. In Italy, a national welfare state never existed. There was nothing that could be described as nationwide social rights or entitlements. Similarly, tax burdens varied from region to region. Once the thin veil of nationalism is stripped back, these fissures become increasingly obvious.

6. Yasuminu Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994).

7. See Anthony Giddens, *Modernity and Self-Identity* (Stanford: Stanford University Press, 1991) pp. 51-55, 228-231; and Scott Lash and Jonathan Friedman, "Introduction" to *Modernity and Identity* (Cambridge: Polity, 1992), pp. 1-29.

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issue it once was.[8] If the League does not follow such a line of reasoning, it may nonetheless benefit from the process it describes.

Of course, collective identities and therefore perceived group interests are never given; they are constructed and interdependent processes, never pre-political, but sometimes beyond everyday politics. Identities are constructed in response to collective problems and they are real in their consequences.[9] The League has somehow understood this. Indeed, most people in Italy have some sense that national identities are invented and are not sacred. Reference is very often made to that most famous of quotes from D'Azeglio opening the first Italian Parliament ("we have made Italy, now we have to make the Italians"); or an earlier one from Metternich. ("Italy is a mere geographical expression").[10] Bossi himself glossed Metternich in the very first issue of his campaign newspaper. "Lombardy no longer belongs to the Lombards. Padania no longer belongs to the Padanian people. It is merely a geographical expression."[11] So the argument that "Padania" is inauthentic or invented is unlikely to cut much ice with League militants, for whom it is no more invented than Italy. These militants came from some of the areas and industries that are most directly involved with the global economy and they are very aware of the implications of European integration. Many have come to see their interests as separate, more likely in conflict with than coinciding with those of other Italians.[12]

The main thrust of the League's communication strategy has been the undermining and questioning of existing definitions of identity and interest. Northern history, dialect, "race," culture, cuisine and, above all, its supposed work ethic have been celebrated in an attempt to raise consciousness of a "Padanian" identity.

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8. The scale required for survival of feasible nation-states was a constant theme in discussions in the 19th century. See Eric Hobsbawm, *Nations and Nationalism Since 1870: Program, Myth, Reality* (Cambridge, Cambridge University Press, 1990); and Zygmunt Bauman, *Modernity and its Discontents* (Cambridge: Polity, 1997).

9. On the debate concerning whether nations are invented or the products of natural evolution, see Anthony Smith, "Ethnic Myths and Ethnic Revivals," in *Archives Européennes de Sociologie* 25 (1984), pp. 283-305; and "Gastronomy or Geology? The Role of Nationalism in the Reconstruction of Nations," in *Nations and Nationalism* 1 (1995), pp. 3-23. Practically everyone today accepts that nationalism uses existing resources to reconstruct collective identities that have become outmoded due to broader historical processes. Just as Basque nationalism continually shifted its references from language to race and back again, so the Lombard League first stressed dialect and then class and economic differences. See Daniele Conversi, "Language or Race? The Choice of Core Values in the Development of Catalan and Basque Nationalism," in *Ethnic and Racial Studies* (January 1990), p. 13.

10. People dispute the exact wording and date of these utterances. This is irrelevant, since what is important is the degree to which these mythologized expressions are part of the everyday understanding of Italian national identity.

11. See *Lombardia Autonomista*, Vol. 1, No. 1 (March 1982).

12. It is difficult to say how many League militants there are. According to the League, the total number of paid up members in 1993 was just under 44,000. The League, however, has not made membership figures public since then.

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The result may be only skin deep, but if Northerners focus on the future advantages of autonomy (with an eye, perhaps, on the Czech Republic[13]), this is a minor hindrance. At any rate, the League has specialized in performative, spectacularized actions designed to keep their interest and identity visible in the media, avoiding detailed debate regarding what "autonomy" actually means.[14] Like many contemporary parties, it avoids commitment to specific policy objectives, preferring slogans and postures, happy to engage in a free play of identity construction appropriate for a period of the breakdown of culture industries, the deconstruction of national publics, and the spectacularization of politics. Also, it is difficult to discern any constant policy objectives beyond maximization of power. It is above all the spectacle that appears to drive party strategy as the media demand ever more extreme stances to warrant front page coverage.

The current phase of the League's campaign originated in early 1995, after the fall of the government in which the League was part of a coalition with "post fascist" Alleanza Nazionale and Berlusconi's Forza Italia. Allegedly, Bossi brought down the government to prevent a split within his movement. Being part of the government brought to the surface conflicts kept latent while the movement was dedicated only to protest.[15] More than 20 MPs left the League between November 1994 and March 1995, mainly to vote with Forza Italia or with one of the League splinter groups, such as the one organized by Luigi Negri. So, at that time, Bossi had to unify the movement and give it a new sense of purpose. He did so by the means he has always used: a strong evocation of the enemy, extremist rhetoric and an ethnicization of the party. Doves, such as House Speaker Irena Pivetti and leadership challenger Roberto Maroni, left the movement (they both later returned), and the League followed a standard strategy for a separatist party: it set up a provisional parliament and government. Thus Bossi had virtual ministries with which to placate the ex-office holders in the party. Northern League MPs did not, however, stop attending the Rome parliament and apparently little is actually discussed in the monthly meetings in Mantova. As usual in the League strategy, this was a posture — though no less effective for being so. The most important event in the parliament remains the press conference.

With the launching of the "Parliament" and the declaration of independence in September of 1996, a complex poker game began. The Italian government's response to the League's secessionist stance has been, until recently, to call the League's bluff, simply by ignoring the movement, even when it operates on the

13. Like the Czech nationalists, the League claims that Italy stands no chance of being accepted in Europe, given the backwardness of the South.

14. For an indication of the range of opinions even within the leadership, see the interviews with Bossi and Rochetta in *Telos* 98-99 (Winter 1993-Spring 1994), pp. 229-248.

15. The movement was splitting between separatists and the advocates of a merger with other parties in the coalition, plus a third group which favored a shift to the Left. In a typical move, Bossi himself claims to have founded the organized factions during the time the League was part of the government.

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borders of illegality. The movement's secessionist action unfolds in a tense space of demand for recognition and denial of it. To take seriously the claims of secession would be to admit that the League acts legitimately as spokesperson for the North. But to ignore it, the government implies that the League speaks for no one and that the secession claim is some kind of joke. Even other parties and organizations hesitate to organize protests against the League for fear of appearing to recognize the League and to give it more publicity. Of course, to ignore the League means also to appear to tolerate behavior such as the setting up of the pseudo-militaristic greenshirts and making public statements that could be seen as illegal "attacks on the unity of the state." Some local magistrates in Bergamo, Venice and Mantova have started legal proceedings against the League,[16] but many are wary, not wanting to provide the movement with martyrs, knowing as well as the League what a boon even a few months imprisonment of a leadership figure would be in terms of protest actions and publicity. League leaders clearly relished a rather clumsy attempt by the police to raid the League's Milan offices in August 1996 (Maroni sported a bandage for several days afterwards). This poker game takes place in a hall of mirrors. Since many of Bossi's supporters are convinced that the "regime media" work in unison against the movement, every posture he strikes can be retold within the movement as a trick for the media, and the stories reported outside the League's own newspaper can be dismissed as distortions.

The strategy of ignoring the League might work. The movement may be in its final throes. But it could also backfire. The League can still attract several million voters to support its self-styled "referendum" on secession and mobilize enough militants to set up several thousand polling stations.[17] It may be, however, that some martyrs have arrived as a gift to the League. In a bizarre parody of a League spectacle of separatism, eight men hijacked a boat last May in the periphery of Venice and demanded to be taken to Piazza San Marco. In contrast to the showbiz separatism of the League, however, these men were armed with real guns, and drove an armored car (which they had converted from a Fiat truck) onto the boat. Upon arriving, they drove onto the Piazza and then occupied the bell tower of the cathedral and declared the independence of the Republic of Venice. Very quickly and relatively peacefully arrested, the eight were at first disowned by the League, who claimed the event was a set up by the secret services to discredit the party. Soon, however, sensing a shift to more extreme positions in the Venetian wing of the League (which had always been more separatist), the League leadership began to make statements in defence of "the Venetian Eight." When they were sentenced in early July, the League publicly criticized the length of the sentences.

It was not until September 1997 that large scale protests were organized against the Leagu'es secessionism. Reflecting the current flirt of the European Left with

16. See "Lega, e Scontro sulla 'Mano Dura'," in *Repubblica*, (June 1,1997).

17. The Referendum took place May 25, 1997. The usual war of figures ensued. The League claimed four million people participated, but polls put the figure at half that number.

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nationalist themes, it was the Unions, rather than competitor political parties, that organized the September 20th demonstrations in Milan and other Northern cities. While the organizers claimed over a million on the streets against the League, critics indeed began to complain that such events only served to inflate the Leagues claims, offer them the first glances of recognition, and keep them present in the media.

Can the League survive this, and will their support tolerate prolonged secessionism? The League has already been declared dead several times, and has generally found a new strategy to prevent normalization of Italian politics and keep their protest machine running. Polls indicate that, contrary to widespread expectations, there is broad support for the current stance.[18] The electoral challenge from Forza Italia is a constant threat to them, and the current left-wing coalition government is reinstilling faith in the Italian state. Even the League's attempt to monopolize protest — effective in the past, when the *pentapartito*[19] coupled with party control of public appointments stifled opposition — is faltering: parliamentary opposition is emerging on the Right. In a situation where polls have proven inconclusive, however, it is very difficult to say how the League will fare electorally in the future. Even if support continues to diminish, however, it is unlikely that the complex of shifting allegiances and identities that they have inspired and steered will disappear overnight. Just as the aftermath of 1968 led to the foundation of the Red Brigades, it is possible that a more extreme, more isolated movement might emerge among frustrated, committed League militants, who have invested large amounts of time, energy and pride in the movement. Even if these scenarios are avoided, it is clear that the League is involved in an inflationary spiral: ever more radical threats must be made to claim the front pages, and the League is constantly challenged to leave its virtual, symbolic world of media politics and make those threats more credible.

The following interview reflects the total about face the movement has made since participating in the government, especially if compared to the one made at the beginning of government participation.[20] Bossi is surprisingly frank about strategy, and about the relation of the identity work of the movement to its political goals. The continuing lack of internal democracy (even after eight months in government, they never made the transition from protest movement to institutionalized party) is reflected in his frankness about how key decisions were made. Bossi advocates peaceful means, but makes oblique allusions to violence, and uses his usual brash, threatening style.

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18. The idea that the North would be better off without the South is very widespread. 34.7% of a sample of 904 Northerners (excluding Emilia) found "The independence of the North" unacceptable. 23.2% found it an advantageous and desirable possibility, and 29,2% found it an advantageous but unacceptable possibility. See Ilvio Diamanti, *Il Male del Nord. Lega, Localismo, Secessione* (Rome: Donzanelli Editore, 1996, p. 77.
19. Five party coalition that ruled in the 1980s.
20. See the interview with Bossi, in *Telos* 98-99, *op. cit.*

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An Interview with Umberto Bossi

Damian Tambini:[21] Let us talk about the League's early days. Bruno Salvadori and his politics were an important source of inspiration for the League . . .

Umberto Bossi: Salvadori was a Valdostanian, the leader of Union Valdoitaine — a small autonomist movement campaigning on the basis of language and local dialect (which is similar to French and has given the Valdostainians the status of a "linguistic minority"). The first task of the Union Valdoitaine was to field candidates in the first European elections in Italy, in 1979. I became acquainted with Salvadori around that time, in Pavia. I stopped to read a poster about federalism — at the time a proposal far from most people's minds — and while I was reading it Salvadori stopped to speak to me. We exchanged opinions for a while and had coffee together. I told him what I thought, i.e., that the state is very strong physically and that the powers of society have been robbed by the state. The state reasons the same way as Sabino Savero, who just before he died told his successors to stay united, pay the army and the rest would be ok. Unfortunately, the state has remained an organization of this type. It does not do anything, but takes everything. And I insisted that federalism could be a step forward, if the crisis of the state became so bad as to put the economy in danger. We spoke of things that seemed obvious to me. Salvadori became enthusiastic. But I was working in electronics, while studying medicine, so I had no time for his movement. Salvadori later called me again, asking if I would have any time to help him put up posters and campaign for his party. Union Valdoitaine was a tiny party, from up in the mountains, but it was trying to get votes all over the Great Padanian Plain. I had no time, but in the end he convinced me to help out. After that, we had the idea of putting together a newspaper. The problem was to create a political movement and culture to make the consciousness of the people mature.

Tambini: And the Lombard League was founded after Salvadori's death?

Bossi: Yes. We worked around these leaflets and these newspapers, and the people who produced and distributed them.

Tambini: Initially, the League was only a circle of friends in Varese. Right?

Bossi: Yes. We started in Varese, then we moved to Como and then Milan.

Tambini: But, in electoral terms, was it not the Venetian League which achieved some success before the Lombard League?

Bossi: Yes, in 1983. They elected a senator and a representative.

Tambini: Was this the inspiration for the Lombard League?

Bossi: We became acquainted with them after the Lombard League had been

21. This interview was carried out on June 10, 1997 at the offices of the Lega Nord, Via Bellerio, Milan.

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around for about a year, in 1983.

Tambini: You met Rochetta?[22]

Bossi: I met Rochetta once around that time in Milan. And I understood that they were in the same wavelength as the Union Valdoitaine. They used the old language, the old nationalism. I said straight away that the globalization of markets would open the way for change at the level of the state.

Tambini: During this phase, the Lombard League's newspapers published a lot of articles about dialect and Lombardy's culture.

Bossi: So all the world around us was based on language and dialect. It was the ethnic idea. The Venetian League was doing very well at that stage. Just like in Union Valdoitaine, you base everything on language in order to try to obtain the status of an autonomous region.[23]

Tambini: Why did you use the symbolism of the 12th century Oath of Pontida when you put together the original Lombard League?[24]

Bossi: When we had to come up with a symbol for the party, I went to Legnano, took the photograph of the statue in the Piazza and so on. I understood what it meant. Then as now, there was a great foreign power that imposes taxes, controls everything, etc. So this period is very similar to the period of the original Lombard League. It was natural.

Tambini: Then there were a lot of articles in your newspapers about the history of the original, 12th century Lombard League.

Bossi: The Lombard League was something hidden from the people in Italy. It was almost forbidden to speak of it. Hegel said that the Battle of Legnano was decisive in opening the way for the Europe of the communes, because the communes took courage from these events. In Italy, however, they keep this history hidden. There were two Lombard Leagues. The first was connected with the Pontida Oath and the Battle of Legnano, in which people from all over the North participated. That was the first time the Celtic world came together. The second time was twenty years later in Mantova. Frederick II, emperor of the Two Sicilies, came North and tried to take the cities one by one, to put them against Milan, but he was defeated by the second Lombard League. He discovered that the North is not Latin and will never tolerate Latins. So there were two Leagues. One from Pontida and one from Mantova, and then from Bonomia (as Bologna was called then), a city of Celts, who came from the Galli Boeri, and so from Bohemia. These regions are all Celtic.

Tambini: The Alliance of the North was founded in 1988, before the

22. Former leader of the Venetian League and once president of the Northern League.

23. Sicily, Sardegna and several other regions in Italy have semi-autonomous status, with strong regional parliaments and tax concessions. Extension of this status to Lombardy was one of the League's early goals.

24. In the early 1980s, the League used medieval symbolism and a reference to 12th century history to frame the League's autonomism. See Damian Tambini, "Strategy or Identity," in *Telos* 98-99 (Winter 1993-Spring 1994), pp. 229-248.

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Northern League.

Bossi: During that time I tried, alone, to make the Northern League. All these other movements were little secessionist movements. I made a very simple analysis. There are basically three ideologies in Italy. Collectivist, fascist and Catholic. The communist idea is still very strong. The Church is still strong from Rome on down. It is all linked to the culture of the Church and the fear of lay culture. And the Church is frightened of investments and work, as if they were contaminations or sins. I understood that this lot would not approve any major state reform. They just want our money. And they have a vision contrary to this country's lay culture. What is happening now is a struggle between the lay culture and the Church's theocratic culture, the fascist and the communist culture. Since the Risorgimento the only thing that has changed is that there is now fascism and communism. So I immediately understood that we had to make a Northern League, because these others did not understand what was going on. There was a physically strong state. This state has an army, a police force and its magistrates. So, when it comes to the crunch, the state does not respect the rules; it uses force. They say "either you understand things the way we do, or we will throw you in jail."

Tambini: How were the League's partners chosen, since in the 1980s there were so many autonomist movements in Northern Italy?

Bossi: We created them all.

Tambini: But, to take the example of Tuscany, there were several autonomist movements — not just the Movement for Tuscan Autonomy with whom the Lombard League allied and eventually merged into the Northern League.

Bossi: First, we had the Lombard League, then I sent men to start movements in other regions. So the Alliance came first. You make these little parties, then you ally them, and then the Northern League comes together. Politicians and states only think in the short term. People, on the other hand, are making long term investments in houses, families and so on. Politicians think only between now and the next election.

Tambini: When the Northern League was founded, was the decision yours or was there a discussion inside the Lombard League?

Bossi: I had considerable weight. At first we were confused with the tail end of 1968, with fascists and communists. All those ideologies — fascism, communism and the rest — are in the end the same. At bottom, they are mechanisms to concentrate power in the hands of the state. On the other hand, we are a mechanism to take power from the state and give it back to society. Since we arrived, the fascists and the communists have unified against us. It was an act of force, and the police acted against us immediately. But we reacted with force. They hit us, so we hit them. You have to have energy to resist.

Tambini: Over the years there have been a lot of changes in the themes that the League has played on. For example, the politics of dialect was abandoned around 1989. You made a speech at the foundation of the Northern League dealing with the impossibility of gaining independence on the basis of being a linguistic

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minority. Why was the decision made to stop the politics of dialect?

Bossi: Because we want to win. What triggers change in states is self-determination and the globalization of markets. Ethnic consciousness is very strong. In the North, the people feel like they are from the North. Padanians feel like Padanians. The basic problem is that those of the North know that they are very different than the Latins.

Tambini: At around the same time, 1989-90, much more than before, the League began to speak about immigration from outside Europe. Why did this suddenly become important?

Bossi: Because the government uses immigration to make sure that the parliament is not made up of *citizens* but of *residents*, people that do not care. They give the vote to these people, knowing that immigrants are centralists. Immigrants vote for a strong central power out of fear.

Tambini: Why?

Bossi: Because immigrants are scared of discrimination.

Tambini: By local communities?

Bossi: Yes. Immigrants seem to be better taken care of by a strong central power.

Tambini: Because local communities are naturally xenophobic?

Bossi: Local communities know they cannot be disintegrated. They resist. They have local customs. This is true not just of central power that takes no notice of the choices it makes. The state is not blind but myopic. It makes all these short term investments, such as with immigration. It does not look at consequences. So the state is interested only in politics. The immigrants vote for those who give them houses and money — not in terms of the community, which has problems of values and freedom. The community then becomes a slave in a democracy. It is democratic in form, but it is oppressive.

Tambini: What about the period 1992-93?

Bossi: This was the period in which the state began to use a politicized magistrature. The state released a monster that it now can no longer stop. It is using the law for repressive purposes. This is bad for the people of the North.

Tambini: But at the same time you and the League are happy to claim responsibility for starting the ball of "Tangentopoli" rolling, to have made this possible.

Bossi: In 1989, we invented the protest vote. Federalism was moving so slowly that we had to invent the mountain of protest votes in order to break up the *pentapartito*. And they all fell, Craxi, Andreotti, all these little thieves fell one by one. (And now they want to indict us!). The problem with the majority system is that it impedes change: a system of two poles. If one side is defeated, the other rises on its feet. It is not that revolutions are impossible, but they are definitely more difficult. So the problem was that the "pool" of *mani pulite*[25] was

25. The group of Milan magistrates responsible for opening prosecutions on the illicit cooperation and corruption that had long linked Italian business and politics.

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put together to pretend to persecute the leaders of the *pentapartito*, who wanted to stay in politics. We took all their power and advanced to the center. The League is not a 'center party.' It is a movement of liberation. It does not matter if our people are Left or Right. What is important is that they want the liberty of Padania. And we took all their votes. Our project was as follows: take the state, institute federalism, draft agreements between North, South, East and West. Five years later, go for secession. Federalism always leads to secession.

Tambini: Does federalism *always* lead to secession?

Bossi: Federalism can only stay on its feet if it involves regions with the same economic position. Otherwise, it only encourages a welfare mentality. With the globalization of markets and the opening of frontiers, the industries of the North begin to go under. So federalism was a means to overcome the Italian nation-state and take power. Now we move on. We smashed the *pentapartito*, of which we left only the communists and the fascists, because the majoritarian system has only two poles. We took a lot of votes and obliged Berlusconi to enter politics. He did, but only to bring northern votes back to Rome with Fini.

Tambini: Was this a period of growth for the League?

Bossi: Yes, but the protest vote is just whipped cream. It is all air.

Tambini: During this period, you also attempted to found the Italian Federal League — a nationwide federalist party?

Bossi: We worked on three levels: at the time the protest vote was the tool to break down the old system; federalism was the future, while independence was the even more distant future. When the protest vote went away, we turned to federalism, and now we are on to independentism. When Berlusconi came along to bring all the protest votes back to Rome, we accelerated the shift toward independentism, founding the independentist faction of the League[26] of which I was a member.

Tambini: What about the decision to become part of the government in 1994?

Bossi: That was imposed by Berlusconi. I wanted to go to Mantova and unfurl the Padanian flag. This meant that he could have had all the votes he wanted. I wanted to start the Northern Parliament to stimulate the government to begin federal reforms. I said he could have all the votes he wanted, but he did not trust us. He wanted us inside the government to hold up the development of the northern government.

Tambini: But there was also a pro-government faction within the League, and at the time there were those who spoke of a merger between Forza Italia, Alleanza Nationale and the League.

Bossi: No one. No one in the League. They were trying to annihilate us? They even offered me the post of secretary of the single party. I told them where to go, knowing well who Fini and Berlusconi are. One is a fascist and the other worse.

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26. An indication of the control Bossi exercises within the League is that, when participation in the government created tensions between separatists and pro-government members, Bossi himself set up the two factions to represent them and appointed their leaders.

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Tambini: Some said that Maroni[27] himself was in favor of the single party.

Bossi: No! These were ministers who had to survive within the Berlusconi government. They had to be careful because it was a very difficult situation. Some of the MPs left because they were bought. But most of them left because they did not understand and they were scared. They knew that the only way was to go North, and that there was going to be a revolution. The North is not small. We are talking about 38 million people, and when they start to shove they will throw these idiot Romans a very long way. No problem. If the North gets up, it will annihilate them. There will be nothing left of these people. Nothing.

Tambini: Who was involved in the decision for the vote of no confidence against the government?[28] The Federal Council of the League?[29] The League ministers?

Bossi: I decided. Clearly, it was considered by the secretaries of the various regions, and it was clear that we could not go on with Berlusconi. The old parties were participating in the government. We had understood a long time before that the government was going nowhere, but they obliged us to participate in the government in order to avoid immediate elections. People would not have understood, so we were forced to become part of the government instead of going straight to Mantova to form the Parliament of the North. They were in a hurry, since the South was holding northerners as slaves. So we entered the government and straight away they started to try to buy us off. But I understood after those terrible blows — like the Decreto Biondi[30]— that Berlusconi was trying to save the old parties.

Tambini: Why did the League initially support the Decree and then pull out after it was signed?

Bossi: They modified the decree and misled Maroni into signing it. I had told Berlusconi not to try any funny business. He could have changed the state and the magistrates. Let us change the law and have the magistrates elected by the people. That makes sense. You cannot make a special law for your brother.[31]

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27. Widely recognized as Bossi's deputy, Maroni was Minister of the Interior during the period of participation in the government.

28. The vote of no confidence was passed on December 24, 1994.

29. The Federal Council is made up of the secretaries of the regional leagues that make up the Northern League. On paper, this is a key institution of internal democracy in the League, but apparently it counts very little in practice.

30. The Decreto Biondi, dubbed by some newspapers the "thief saving decree," was a defining moment in the history of the 1994 coalition government and the League. Issued on July 13 1994, after a spate of suicides of leading industrialists and politicians awaiting trial, it resulted overnight in the release of over 2000 prisoners, among whom 189 were awaiting trial on charges of corruption. In a near farce, League minister Maroni first signed the treaty and, amid the public uproar that the releases caused, claimed that he was misled into signing a decree which had been amended without his knowledge.

31. On July 11, 1994, Prime Minister Silvio Berlusconi's brother and colleague, Paolo Berlusconi, had been indicted on charges of bribery.

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Tambini: The beginning of 1995 was a difficult time for the League. Some of your deputies had defected, and the government had fallen. At that time, the League launched a new strategy of secession and a new set of symbols.

Bossi: We had always been behind the secession strategy. We have always known that secession was going to happen — always.

Tambini: But in the League's newspapers you never used the word "secession."

Bossi: We had to slowly get the idea into the minds of the people. The problem is to make non-violent revolution. Real revolution, not a coup. That is what communists do. Just change those in charge. That is a coup, not a revolution. The League was born looking for the chance to make a revolution.

Tambini: When was the Parliament of the North set up?

Bossi: In June 1995. Berlusconi made Padania waste two years.

Tambini: What does the Parliament of the North actually do? It meets once a month, but what does it do during these meetings?

Bossi: Lots of things. It prepares what is inevitably going to happen. All revolutionaries have provisional parliaments and provisional governments. These are the instruments which the colonizers have to deal with. So, our Parliament is the tool with which the Roman colonizer will have to deal. Very soon.

Tambini: During these events, with the declaration of independence and the opening of the Parliament of the North, was there any attempt to be recognized abroad?

Bossi: No.

Tambini: No letter to the UN?

Bossi: No. We have the strength to deal with the Romans on our own. We are not a small people. We do not ask for any help from abroad, but we are able to stand up to any people, especially the Italians. We are 38 million people.

Tambini: But, in order to secede, at some point one needs international recognition.

Bossi: Formentini, who was the Mayor of Milan, is now Foreign Minister of Padania. Speak to him.

Tambini: What will he do?

Bossi: I do not know. Ask him. Padania's first political elections will be held next October or November. So there will be a Parliament elected by the people.

Tambini: And there will also be parties?

Bossi: There will be everything that goes with free elections.

Tambini: Since 1995, the League has used a new symbolism, with the Po River as a focus. There are the greenshirts. No one talks about the 12th century history of the Lombard League any more.

Bossi: We are strong. We are adults. We are close to revolution.

Tambini: Why the Po River?

Bossi: Padania's very name comes from the Po. There were trees next to the river called the 'Padi.' They were very resinous trees, probably pines.

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Tambini: Why the ceremony with the water?

Bossi: For the Celts, water was god. Then the Catholics took over . . . In the ceremony we took clean water from the source of the Po and poured it into the Lagoon of Venice. We made the cycle, declaring independence like Catalonia did in 1932, I think. We issued the declaration to indicate to the whole world where Padania was going.

Tambini: Did you personally invent the ceremony with the water?

Bossi: Yes.

Tambini: Why the greenshirts?

Bossi: The color is Celtic. . . green stands for the great plain of Padania . . . it stands for recognition, spring and hope.

Tambini: I recently spoke with Pagliarini.[32] He said that the logic of the League is purely economic, not ethnic.

Bossi: True. Behind the process of self-determination is the process of the globalization of markets. Now there are no more crises of empires, decolonizations or socialism. Now there is the need for productive systems to stay on their feet and compete. They cannot do that if different parts of the state have entirely different economies. The South is rated 200th in the world in terms of competitiveness. The North is 15th. How can these two places work with the same currency and with the same laws?

Tambini: Why has the North developed so impressively? Is it because the people of the North are Celts?

Bossi: Yes, that too. We are closer to Europe. The South has its own history. They were liberals like us, but Cavour died holding his head, hoping that the Padanians could help the South to reach European civilization. Being Celtic means that there is an affinity with European cultures.

Tambini: What does being Celts have to do with anything? The Irish say that they are Celts and have a Celtic language, that because they are Celts they are more artistic and passionate than the English.

Bossi: We have Celtic *origins*, but we have a rational culture. The origins were not Latin. The Celtic world in England was very different to the Roman one, which was theocratic. The Celts were trapped by the Romans.

Tambini: To move on to something completely different. The relation between Gianfranco Miglio and the League. When did he enter the League?

Bossi: I met him in 1991 and he became involved in the 1992 electoral campaign.

Tambini: Were there difficulties, for example, during the 1993 Congress or with his federal constitution?

Bossi: No. The problem was that he did not become a minister when we went into government.

Tambini: Why was he not made a minister?

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32. Leading League figure. Minister of the budget in the 1994 government.

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Bossi: Fini, the fascist, was against it because Miglio was more pro-independence than the others — and so was Berlusconi. So Miglio wanted to be Minister of Constitutional Reform, and he was upset with me because he thought I did not defend him against Berlusconi and Fini, who were the ones that opposed him.

Tambini: That is it?

Bossi: Professors are a peculiar lot. They think the world turns around them.

Tambini: Miglio never attempted to come back to the League?

Bossi: It would be difficult. But in Greater Padania there is space for him too.

Tambini: With the exception of Miglio, however, there has been a marked lack of intellectuals in the League.

Bossi: We have a lot of very able people? hundreds. It is not that the League has no intellectuals. The League does not want the help of intellectualoids — people who write, professors. The members of the League are strong. The professors are just ready to jump on the bandwagon if the bandwagon wins.

Tambini: You do not think League needs new ideas?

Bossi: We have loads of ideas. We could teach the world how to do politics. Professors understand nothing about politics.

Tambini: It is strange to see how simple and basic the League's ideas are. You never speak about group rights, about communitarianism. It seems almost that your separatism is just a posture.

Bossi: You know the answer to that question. Only small movements need that kind of waffle. And they need to speak about language, customs and all that. If a movement is strong, it has no need of that stuff. Europe should wake up, because Padania must become, very soon, a nation-state like the others — internally federalized, of course.

Tambini: What is the difference between this "Padania" and a nation-state?

Bossi: We will be internally federalist, with a principle of self-determination of the regions within Padania. All civilizations have died in the same way. They take power from society, undermine the economy, and then force society into contradiction and crisis. I hope European states can give power back to the people.

Tambini: What about the future?

Bossi: Padania will become an independent, sovereign, republic. The South will find its way, since the cost of labor will go down and it will develop and get over its welfare habit. Now it is only the wackos — the communists, the fascists, and the Catholics — who are crazy, who try to regulate the economy of Padania with repression. But they are too few. There are just too many Padanians. Thirty-eight million.

Tambini: The votes for the League are only a fraction of that, and many of those are just protest votes — whipped cream, as you said.

Bossi: The League is supported by 30% of the Padanians. We are the leading political force there. After November, we will have our own parliament. Let us see what they can do. Padania is like the Pacific Ocean: peaceful but strong. The

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state has its army, but it cannot use it against its own people. Then it has about 300.000 carabinieri and policemen, 200.000 of which are in the North. We are strong. There are about 5 or 6 million Padanians that will come onto the streets.

Tambini: Is this the strategy of a leader prepared to use violence?

Bossi: No. We are too many for violence to be needed. This will be the smiling revolution. We will be singing songs. We do not use arms.

Tambini: Why speak of the army and the carabinieri?

Bossi: I was speaking about what the state has. Not us. Ours will be a smiling revolution. They will just come onto the streets and that will be it. Padania will be a sovereign, independent republic — maybe after a confederal phase. The police's attempt to turn us into terrorists will be resisted by Padania. This is not a small political movement. It is big, determined, and will not accept Roman power. In Rome they are all crazy. All these ideologies have just gotten themselves into a hole — Catholicism, communism, fascism.

Tambini: Padania is not an ideology?

Bossi: Those who were born here feel it. They know where they come from. Look at any map you like and you will see "Padanian Plain." Look at that map. "*Mare Gallicum.*" Padania has always been there. For thousands of years, in the consciousness of the people. And these people have to put up with all these southern teachers that teach another culture. None of the magistrates are Northerners. This is colonialism.

Tambini: What are the limits of the legality of this strategy of secession? Do you think you will be indicted for this?

Bossi: I do not know whether my people will indict me. The enemy power does want to take me to court. But this is a process that no one can stop. No one.

Tambini: Is it not a big problem for the League that nearly all of its support is concentrated in a few parts of Veneto and Lombardy?

Bossi: And in Friuli. But think about it. Lombardy alone is bigger than Belgium. There are five million in Veneto, two million in Trentino, two million in Friuli, and in five in Piedmont. We have more inhabitants than Belgium. Padania will be the 23rd country in the world in terms of population.

Tambini: But only a fraction support you. There are parts of Piedmont and Emilia where there is hardly any support for the League, and even less in Tuscany.

Bossi: Tuscany is the non-Padanian North. Tuscany has its own strong culture. The same goes for Umbria.

Tambini: So Tuscany is no longer part of Padania?

Bossi: It is no longer part of the project, but they can democratically choose to join us.

Tambini: There also are the interests of the bigger industries in the North, as well as small and medium-sized enterprises.

Bossi: What can they do faced with millions of people? Berlusconi, Agnelli. Who is Agnelli, anyway? They can do nothing when faced with the North.

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Tambini: The League votes come from places such as Varese and Bergamo, where industries are small. Not many workers in large factories vote for you.

Bossi: But those are like the priests. One day they are not there, but the day after they will be with you. Like the Holy Ghost, they go with the winners.

Tambini: A question concerning strategy. There are many, Miglio included,[33] who say that, for the League, federalism and ethnic nationalism are only tactics to make news and put pressure on the government.

Bossi: It is not ethnicity that counts but, rather, the globalization of the economy.

Tambini: You used to talk about dialect all the time.

Bossi: That was when we were the Lombard League, the Venetian League and so on, and we were separate. We were using dialects, that sort of things, because it was something we all had. Then I came and so did other themes — weapons capable of bringing down the state.

Tambini: Yet the League has returned to cultural themes. I see that there are going to be dialect poetry festivals organized by the League. Many people say these things are just strategic — a way of making publicity for the League.

Bossi: What does that matter? Come back next year. This is the last year of slavery for Padanians. Next year is the year of Padania. There are millions of people who have had it up to here with Italian thieves. So the door must be closed. We have to stop them. Then international organizations will be involved, perhaps. It would be difficult to sit around a table to discuss these things with those who do not have a lay culture — with people who do not think the state is the Eternal Father embodied on earth. Their police and army can only tickle the great peoples. This is not a little people: it is a group of peoples that comes together and, as such, is invincible. We call it a League. It is enormous. Rome and its racist colonialism can do nothing. I hope they do not turn to violence in desperation.

33. Gianfranco Miglio, "Per La Lega è Strategico il Federalismo," in *Federalismo e Società,* Vol. 1, No. 2 (1995).

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Radical Feminism in Canada

John Fekete, *Moral Panic: Biopolitics Rising*, 2nd edition, revised (Montreal-Toronto: Robert Davis Publishing, 1995).

In light of John Fekete's account of the effects of radical feminism, it is difficult to characterize what is going on in Canada and, to a lesser extent, the US. Perhaps a new hybrid — petty totalitarianism — is needed to comprehend this phenomenon. It is commonplace to refer to Italian Renaissance principalities as petty absolutisms. The princes were all-powerful within their small domains. Similarly, in its elitism, ideological dogmatism, intolerance, and punitiveness, Canadian radical feminism exhibits totalitarian characteristics. But this totalitarianism remains petty because of its limited range of available punitive sanctions and its narrow institutional scope.

Fekete has written an important book, perhaps an indispensable one, but what he writes about is rather unpleasant. The bulk of the text is devoted to an analysis of flawed statistical studies, conducted or propagated by radical feminists, that substantiate a self-serving ideology, i.e., the pervasive oppression and violence by Canadian men against innocent and vulnerable Canadian women. If the statistics are accepted at face value, these seemingly civilized men are engaged in nothing less than a "male-perpetrated holocaust" against women (p. 102). The net effect of these studies is the creation of a panicked atmosphere reminiscent of prior, apparently dissimilar 20th century witch hunts. The chilling closing chapters turn from abstract statistics to individual case studies. Fekete repeatedly asserts that he is not denying or condoning real instances of oppression and violence by men against women; indeed, the flawed statistical studies, with their absurdly broad concepts of violence and abuse, obscure and minimize the plight of real victims. But within the new panicked atmosphere, Fekete's case studies recount the fates, not of battered or abused women, but of men and women who have suffered because their language or behavior has somehow violated the radical feminist ideology.

Radical feminism in Canada is part of the postmodernist preoccupation with the trinity of race-class-gender. Curiously, while class remains the central term in the mantra, it is evanescent in postmodernist scholarship and politics. Class is an essentially social and political construct that unifies seemingly disparate groups of people according to their place in the national and international economies. Despite its indispensability in understanding our era of lost manufacturing jobs, stock market record highs, the rise of the service sector, obscene executive salaries, and corporate downsizing and outsourcing, class as an analytic concept seems to have been abandoned because of the alleged obsolescence of Marxism and the demise of Communism. Thus, in practical terms, the postmodernist trinity is a duality, race

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and gender: two concepts that create a divisive identity politics; two concepts with important social and political implications, but whose roots ultimately lie in aspects of human biology. Within race and gender identity politics, biology is once again destiny. Despite their self-perception as liberals or even leftists, the postmodernists thus revive a biological conception of human life and society long associated with the radical Right. There are important differences, but in their paranoid assertion of pervasive oppression and their attempt to forge a biologically-based political response, race and gender identity politics have more than a slight resemblance to the white racist Christian identity believers on the contemporary far Right.[1] In Fekete's words, the new postmodernist biopolitics returns us "to the dark mythologies of race and gender, to skin colour and sex organs as regulators of perception, and to all-embracing explanatory fictions like 'patriarchy'" (p. 12).

1993 was a banner year for questionnaires that provide empirical confirmation for the radical feminist ideology of pervasive male oppression of women. Surrounded by references to rapes in Bosnia and the 1989 slaughter of eighteen female students by Marc Lépine in Montreal, the final report of the government sponsored Canadian Panel on Violence Against Women (CanPan) claimed that no less than 98% of Canadian women had been sexually violated; at this rate, it is a wonder that Canadian men have any time left to indulge in beer and hockey. Subsidized by a government grant, Walter DeKeseredy and Katherine Kelly's "Woman Abuse in Dating Relationships: An Exploratory Study" (WADR) maintained that 81% of female Canadian college students experienced sexual, psychological, or physical abuse from men. Statistics Canada's "Violence Against Women" (SCVAM) defined the character and rate of the carnage. According to SCVAM, "51% of Canadian women have suffered from male violence since the age of 16, and 39% have been sexually assaulted, 5% in any given year, 16-20 times more than get reported to the police" (p. 51).

The authors of these and similar studies are oblivious to the basic limitations of survey research. They presume that all responses to the questions are entirely truthful, and they make no attempt to corroborate the responses to the questions with actual human behavior. If a woman reports that she was sexually abused, then it is an accepted fact. Moreover, these examples of survey research are particularly flawed. Although the CanPan, WADR, and SCVAM figures on sexual violence are unchallenged in later radical feminist research and, worse, become the basis for pernicious institutional policies, Fekete ferrets out the howlers, including flaws in sample size and composition, biased questions, problematic concepts, statistical errors, and mysteriously unverifiable data. But there is more at stake here than misunderstood research findings and deficiencies in the execution of survey research. Fekete's (highly alliterative) analysis

1. See the two fine books by James Aho, *The Politics of Righteousness: Idaho Christian Patriotism* (Seattle: University of Washington Press, 1990) and *This Thing of Darkness: A Sociology of the Enemy* (Seattle: University of Washington Press, 1994).

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of the Clinical Fallacy, the Corrupt Continuum, and the Cancerous Cause demonstrates the systematic distortion of this research by radical feminist ideology.

By the Clinical Fallacy, Fekete refers to the projection of the experiences of women who have been raped or become the victims of violence as representative samples of the general population. The pathological thus defines the normal. The resulting exaggeration of the rates of rape and violence not only confirms the preconceptions of radical feminist ideology, but also serves the bureaucratic self-interest of the intervention agencies and their academic allies: "Much of the emotional scaffolding for the violence scare has been assembled from responses to the stories, figures, and casualty reports coming out of the shelters for battered women, the rape crisis centers, the hospital emergency rooms, the police and court reports, and finally from the scholarship that has grown up around these social, legal, and medical life supports" (p. 47). These cases provide the extreme pole of the Corrupt Continuum. In the anti-male, anti-sex spirit of Catherine MacKinnon's radical feminist ideology, even innocuous male behavior exemplifies male violence and abuse. Thus, in the SCVAM study, 51% of Canadian women have been victimized by male violence, where this violence ranges from an unwanted blown kiss, through rape, to knifing and shooting. With a logic reminiscent of the old domino theory or the current war on drugs, the Corrupt Continuum provides the foundation for the Cancerous Cause. That innocuous comment, look, or blown kiss is just the first instance of a pattern of male violence that will escalate into fondling, pushing, slapping, and perhaps rape and murder.

The Cancerous Cause has important implications for institutional and public policy. If that gaze, comment or blown kiss has the potential of becoming rape and murder, then there must be Zero Tolerance for all occurrences of male violence. Claiming to speak for the interests of all women, radical feminist ideologists define violence as anything that they do not like in society, "including advertising, pornography, competitive sports, linguistic expressions, the books we read, the movies we watch, the education we get, the jokes we laugh at" (p. 103). Contrary to the ideological presumption of perpetually vulnerable women, radical feminists have succeeded in getting this rather elastic conception of violence incorporated into laws, court decisions, and administrative policies.

In the transition from the 1960s to the 1990s, feminism lost its character as a liberating ideology. Asserting the strength of their sex and its essential equality with men, the 1960s countercultural feminists freed women from an externally imposed and patriarchal sexual morality, only to lose this sexual freedom in the repressive ideology of radical feminism in the 1990s. With MacKinnon's equation of normal intercourse and pornography with rape, sex is turned into a form of violence and women are the perpetual victims. Combined with the exaggerated statistics about abuse, the equation of sex with violence leads to the increasingly intrusive regulation of formerly private matters. Reveling in their new role as rectifiers of social problems, college and university bureaucrats have been in the vanguard of the implementation of the radical feminist agenda. Thus, in order

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to control the alleged epidemic of date rape, universities develop codes of conduct for sexual relations among students, with the concomitant need to create agencies to enforce these codes. Even in his darkest forebodings about the inescapable iron cage of bureaucracy, Max Weber probably did not anticipate rules and agencies with jurisdiction over a Saturday night date at the movies.

In his later chapters, Fekete offers fourteen brief and three long case studies of professors, male and female, who have run afoul of radical feminism. Except for the fact that the accused are presumed guilty of abuse or discrimination against women unless or until they can prove themselves innocent, each case study presents a unique set of circumstances. Consider the following case. A male, senior scholar — and lifelong defender of sexual equality — has a pair of heated arguments with a female, junior colleague over the latter's treatment of a graduate student on a comprehensive examination. The student failed the quantitative section of the exam for the second time. If Fekete's earlier analyses are correct, this failure would qualify the student for statistical work on Canadian violence against women, but it disqualified him from the doctoral program. Rather than treating this as one of the numerous disputes and professional problems endemic to life in academia, the fate of the dismissed student is ignored as the female professor turns this quarrel into a feminist crusade. Consonant with radical feminist ideology, the allegedly powerful male professor has intimidated, verbally abused, and professionally damaged the allegedly weak and vulnerable female professor. The female professor rejects the male professor's oral and written apologies for his demeanor, and the department takes the first of an ever escalating set of sanctions against him: a reprimand in his personnel files, removal from participation in the graduate program for five years, and an unsatisfactory performance review, with its concomitant loss of salary. Still not satisfied, the female professor takes the case to the university ethics committee, which demands another written apology from the male professor. In a process reminiscent of the preparation of Rubashov for the show trial in Koestler's *Darkness at Noon*, the written apology is deemed not sufficiently abject. Now the committee demands a new written apology that will be distributed throughout the university, to the male professor's supporters at other universities, and published in the local newspaper and on the Internet! The first version of this apology also strikes the wrong note, but the committee finds the revised version suitable for the professor's public humiliation. Finding this punishment still inadequate, the female professor rejects the apology and appeals to the university president for additional punitive measures. The university provost takes the unprecedented action of condemning the male professor in the city's newspaper, while the president appoints a grievance committee to take up the female professor's charges. Surprisingly, this male professor has so far avoided the common practice of political re-education in the form of compulsory sensitivity counseling. And there the case stood at the time of the publication of Fekete's book. The consequences are distressing if not deadly, but the process resembles the old activities in the basement of the Lubyanka.

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Fekete's case studies reveal the totalitarian aspects of radical feminism. Despite the convenient rhetorical pose of women as perpetual victims, radical feminists are not disadvantaged women but the "powerful, the newly powerful, and the nearly powerful" women in society (p. 34). In a process that Trotsky called "substitutism," radical feminists arrogate to themselves the right to define the character and needs of all women — and the caricature of men. Once in power, radical feminism abolishes genuine politics in the form of disputes over ideal and material values, and substitutes the imposition of ideological and linguistic conformity. Although it has been used in a number of contexts in contemporary politics, the phrase Zero Tolerance still has ominous connotations, as it indicates radical feminism's absolute intolerance of forbidden speech and action. In order to achieve Zero Tolerance, radical feminism needs the services of increasingly intrusive state and educational institutions. In true totalitarian fashion, violators of the new radical feminist order are subjected to a therapeutic cleansing.

But the totalitarian character of radical feminism should not be overstated. If it exhibits ominous totalitarian tendencies, radical feminism is a distinctly petty totalitarianism. It is petty because of the limited sanctions that it can impose. No matter how distressful, reprimand, humiliation, counseling, and dismissal are not comparable to imprisonment, torture, slavery, or death. It is also petty because of the limited number of institutions that are effected by radical feminism: it has had its greatest impact in higher education and government agencies, but much less in other institutions. As Camille Paglia once wrote, "the reform of a college English department cuts no ice down at the corner garage."[2]

Finally, one must resist the temptation to create a reverse panic — a panic about radical feminism. Early in the book, Fekete warns that instances of male violence or abuse must be placed within the totality of life experiences: how, over a lifetime, do these possibly once-in-a-lifetime events stack up among other things: the love of one's life the birth of a child, the drudgery of repetitive acts, the excitement of an achievement, some unpleasantness at work, with the babysitter, with mother or sister, the death of a parent, a lover, or a child? How does a single act of what is called sexual assault weigh in the balance of a lifetime of sorrow and pleasure and all the dilemmas and serendipities of life? (p. 46). Radical feminism must be understood within the totality of relations between the sexes. Seventeen victims of radical feminism are seventeen too many, and doubtless there are others. But victimization by radical feminism has to be the exception and not the rule. Even in politically correct Canada, there must be innumerable interactions and relations among male and female professors and students that have not been soured by the ideology of radical feminism.

John Bokina

2. Camille Paglia, *Sexual Personae: Art and Decadence from Nefertiti to Emily Dickinson* (New York: Vintage Books, 1991), p. 22.

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Max Weber's Sociology of the State

Andreas Anter, *Max Webers Theorie des Modernen Staates. Herkunft, Struktur und Bedeutung* (Berlin: Dunker and Humblot, 1995).

Stefan Breuer: *Bürokratie und Charisma. Zur politischen Soziologie Max Webers* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1994).

Stefan Breuer: *Max Webers Herrschaftssoziologie* (Frankfurt a. M.: Campus Verlag, 1991).

While the Marxist theory of the state was predominant in the 1970s, this account began to fade in the 1980s because, by overemphasizing the autonomy or "relative autonomy" of state and politics, "many of its crucial insights were lost to view in a welter of starting points and obscure formulations."[1] As Giddens points out, to speak of "relative autonomy" is redundant since in society and politics all autonomy is "relative."[2] If such is the case, why not approach state and politics first as "autonomous" realms and then focus on their relations with other spheres? The only theory of the state which explicitly postulates the autonomy of the state and politics is Max Weber's, as formulated in "Intermediate Reflections."[3]

Like Marx, however, Weber did not develop a systematic theory of the state. Andreas Anter and Stefan Breuer seek to do so by departing from Weber's insights. Anter's *Max Webers Theorie des Modernen Staates* provides a systematic account of what Weber had to say concerning the modern state and of related discussions at the turn of the century.[4] For Weber, the core of every state is the

1. Bob Jessop, *State Theory. Putting the Capitalist State in its Place* (Cambridge: Polity Press, 1990), p. 2.

2. Anthony Giddens *A Contemporary Critique of Historical Materialism* (Basingstoke: Macmillan, 1981), p. 217.

3. "In the final analysis . . ., the whole course of the state's inner political functions, of justice and administration, is repeatedly and unavoidably regulated by the objective pragmatism of 'reasons of state.' The state's absolute end is to safeguard (or to change) the external and internal distribution of power. . . . It is absolutely essential for every political association to appeal to the naked violence of coercive means in the face of outsiders as well as in the face of internal enemies. It is only this very appeal to violence that constitutes a political association in our terminology. The state is an association that claims the monopoly of the *legitimate use of violence,* and cannot be defined in any other manner. . . . 'Reason of state' thus follows their own external and internal laws. The very success of force, or of the threat of force, depends ultimately upon power relations and not on ethical 'right,' even were one to believe it possible to discover objective criteria for such 'right'." See Hans H. Gerth and C. Wright Mills, eds., *From Max Weber. Essays in Sociology* (New York: Oxford University Press, 1946), p. 334.

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monopoly of violence. Rudolph von Ihering (1877) and Adolf Lasson (1882) had already pointed this out. The term "monopoly," however, did not appear in the literature before 1871, the year of the founding of the German "*Reich*." For Anter, Weber's account is an expression of his times and reflects the official positions of Wilhelminian Germany. Yet Weber's definition of the state has gained international acceptance and today it is hardly ever challenged.

Anter develops Weber's notion of "*politischer Anstaltsbetrieb*," which Roth and Wittich render correctly (but not too elegantly) as "compulsory political organization with continuous operations." He stresses Weber's analysis of the state as a political organization of domination (*Herrschaftsverband*) and argues that there are three distinct concepts of politics in Weber. The first relates politics to state control, the second refers to the distribution of power and, finally, politics is conceived as struggle. Despite this threefold qualification, Anter maintains that Weber ultimately defines "politics" in terms of the state.

The state as a structure of command and obedience can only achieve stability if its subjects and, more important for Weber, the administrative staff, believe in its legitimacy. Anter shows that Weber cannot be associated in any way with a normative theory of legitimacy. Although Weber never defines the concept of legitimacy, there is no doubt he is only interested in the *de facto* belief in the validity and efficacy of domination. Furthermore, Weber's types of legitimacy are constructed from a ruler-centered perspective; legitimacy is but another means to maintain domination, in addition to violence and administration. Anter emphasizes that, for Weber, democracy is also a relation of domination and not its elimination. Thus, in modern mass democracy, democracy takes the form of bureaucratic domination.

One virtue of Anter's book is that it stresses the connection between Weber's sociology of law and the theory of the modern state. Although the monopoly of violence is the decisive feature, law is equally relevant for exercising state power: the modern state cannot be conceived without law; modern law, not without the state. State formation is a process of juridification of the state. In turn, the genesis of rational law is a process of nationalization (*Verstaatlichung*) of all legal norms. The state is the actual basis of modern law; law provides the form within which the modern state works. Anter outlines Weber's account of the complex relation between the standardization of law and state centralization, between the codification of law and the juridification of the state, and also of how the modern state entered into an alliance with lawyers to advance its claims to power. In contrast to

4. The book consists of six chapters. The first analyzes Weber's theory of the monopoly of violence and the concept of the "*Anstaltsstaat*." The second relates the theory of the state to the sociology of domination and legitimacy. The third and fourth discuss Weber's methodology and his theory of value-judgments (*Werturteilslehre*). The fifth deals with the historical development of the modern state. The final chapter focuses on Weber's metaphors of the state as "machine," "mechanism," "apparatus," "enterprise," and "factory."

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Habermas' and Schluchter's interpretations, Anter emphasizes that Weber's theory of the state and law is incompatible with legal positivism: Weber analyzes the state and law within the context of history, domination, economy, and society, whereas legal positivism must exclude such factors as irrelevant. Also convincing is Anter's claim that Weber's theory of bureaucracy is to be read as part of his theory of the state and that state formation coincides with the formation of the modern rational bureaucracy.

Anter argues that, for Weber, only the modern, Western, rational, bureaucratic "*Anstaltsstaat*" can be called a state. A "state" is a historically specific formation and cannot be confused with other political organizations belonging to different cultures and epochs. A "rational" state was only possible in the West, because such a formation is historically and geographically specific. Indeed, only after the achievement of the monopoly of violence does it make sense to speak of a "state." According to Anter, it is historically wrong to project this state on to the old Romans, the Greeks, the Egyptians or the Middle Ages. Yet, although he saw the state as a specifically modern phenomenon, in *Economy and Society* Weber wrote about the states of the old Egyptians, Chinese and Greeks.

Three questions are in order here. First, Anter seeks to justify Weber's attempt to explain the state in terms of individual agency. Such an account underestimates Weber's own "structural" concept of the state, according to which the state has an internal logic and autonomy. Such a "structural" view is incompatible with his methodological individualism, as exemplified in the first chapter of the sociology of basic concepts. Weber's agent-orientated interpretation, in which the state comes in and remains in existence because certain actors base their actions on the assumption that the state exists or should exist, contradicts his notion of the state as an organization of domination based, in the last instance, on physical violence and following its own laws (*Eigengesetzlichkeiten*). In terms of the latter approach, it is not necessary to refer to the self-understandings of agents to explain the functioning of the state. Of course, violence also must be exercised and its monopoly enforced by agents; there must be enough actors willing and able to exercise violence on others and claiming that they have no right to resist. However, the unintended outcome of these actions, the "objective pragmatism of state reasons" and the internal logic of the so-called *Gewaltsamkeitsrationalisierung* (the justification of the use of force)[5] by the state cannot be explained in terms of "will," "intentions," "understanding," "motives," etc. Rather, as a social macro-structure the state must be analyzed through categories independent of agents. A similar problem occurs when Anter claims that, for Weber, a sociologist can see the state only as a conceptual construct. This seems to forget his other view, that the material bases of the state are violence and domination. Violence and domination in their physical and material presence and observer-independent

5. *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie* (Tübingen: Mohr, 1980), vol. I, p. 362.

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reality are more than mere sociological constructs. At any rate, Weber never wrote a "social construction of the state."

Second, it is doubtful whether Weber really defined politics as so closely tied to the state. In Weber's political writings, the state and the nation are emphasized. Yet the central concept in *Economy and Society* is domination, and the modern state represents only one historical form of political domination. Pietro Rossi is right when he stresses that Weber breaks with the German state tradition equating politics with the state.[6] Thus the theory of politics in *Economy and Society* is based on domination and not on the state. Political relations are no longer defined exclusively as state structures. The state presupposes the political organization of domination. It is a specific organizational form of domination — a political structure among others. According to Hennis, Weber's sociology must be read as a theory of the "complexes of domination."[7] In this sense, Weber did not write a sociology of the state, not because of his early death but because a theory of the state was already part of the sociology of domination.

Finally, it is surprising that, although Anter places Weber in the context of the debate concerning the state at the time, he does not even mention the impact of Marx's and Engels' accounts of the state. It is hard to believe that Weber remained untouched by the Marxist view of the state as an organization of violence and domination embodied in the bureaucracy, the army, the police, prisons, the judicial system, etc. At any rate, despite these objections, Anter's reconstruction of Weber's theory of the modern state remains an important contribution.

In *Bürokratie und Charisma*, Breuer also analyzes Weber's sociology of the state. He rejects the view that for Weber "politics" and "the state" are to be defined in terms of the *modern* state. Rather, these concepts are also applicable to premodern states. He shows this by arguing that there are two different sociologies of the state in Weber. The earlier version dates back to before 1914 and can be found in the sociology of law and the "*Kategorienaufsatz*" of 1913. According to this version, Weber sees the state as an "*Anstaltsstaat*" — a state characterized by a rationally imposed order. Breuer shows how Weber relies on Tönnies to show how the state is only possible within certain kinds of socializations embodying particular types of rationality. According to this version, the state is an exclusively modern phenomenon: a product of Western rationalism. To call "states" structures of domination of past cultures would be historically anachronistic.

According to Breuer, there is a second concept of the state transcending particular cultural limitations. This version can be found in Weber's "basic sociological concepts" and his "sociology of domination." Furthermore, Weber himself uses

6. Pietro Rossi, *Vom Historismus zur Historischen Sozialwissenschaft. Heidelberger Max Weber-Vorlesungen 1985* (Frankfurt a.M.: Suhrkamp 1987), pp. 124-126,134.

7. Wilhelm Hennis, *Max Webers Fragestellung. Studien zur Biographie des Werks* (Tübingen: Mohr, 1987), p. 218f.

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this concept of the state in his material studies with no restriction to the modern rational type. The defining criterion of this second version is the monopoly of domination and violence. Here, the transformation from a polyarchic to a monarchic or monocentric structure is decisive. For Breuer, it is possible to speak of states on the basis of charisma or traditional authority and not just rational legal authority. This second concept is characterized by Jellinek's approach to the monism of state domination. Weber's last and decisive theory of the state is predicated on the monopoly of violence and legitimacy. Thus, according to Breuer, there can be states without a rationally imposed order, lacking "*Anstalt*" or "*Betrieb*."

Breuer criticizes Weber for suggesting that political rationalism was a product of the 15th and 16th centuries. Instead, he argues that the state at that time cannot be described as a formal political organization, neither in terms of law and administration in general nor in terms of financial and economic administration in particular. *Material* rationality had not yet been replaced by *formal* rationality. According to Breuer, the formal rational state can be seen as the result of two processes. The first is the rationalization of the war machinery of continental absolutism and the role of the military in the formation of the European state system. The second, the rational state, characterized by the monopolization, centralization, professionalization and bureaucratization of political power, is a product of the French Revolution.

Breuer pays special attention to the relation between political rationalization and charisma to show the link between the charisma of reason in the French Revolution and the rationalism of political, administrative and legal institutions. He pursues the development of the charisma of reason from canon law to the absolutist state's "reason of state" and the French Revolution's "general will" to show the singularity of the rationalist state and its features as a centralized, hierarchical and depersonalized political power. This connection between political rationalization, in the form of the bureaucratic "*Anstaltsstaat*," and the charisma of reason, is only a particular case of Weber's general view of modernization as the intertwining of rationality *and* charisma. Breuer provides detailed accounts of the charisma of the French Revolution, the nation, the Leninist Party organization, and the political leader, as well as its anti-authoritarian direction in "democratic legitimacy."

In his other book, *Max Webers Herrschaftssoziologie*, Breuer provides more than merely an interpretation of Weber's political sociology.[8] He also seeks to update Weber's account in light of recent research.[9] Although he demonstrates

8. The first chapter outlines Weber's sociology of domination; the second discusses the problem of charisma and its historical development; the third examines traditional forms of domination; the fourth explores predominant structures of domination in the West, while the final chapter analyzes rational domination.

9. Prior to this work, Breuer had already published books on the sociology and historical development of premodern states and empires. See his *Imperien der Alten Welt* (Stuttgart: Kohlhammer, 1987); and *Der Archaische Staat* (Berlin: Diederichs, 1990).

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the usefulness of Weberian concepts in analyzing political structures, he questions whether domination and hierarchy are still the main structures of modern societies. Therefore, Breuer reads Weber's sociology of domination as a "farewell to a bygone world" exhibiting serious shortcomings. Accordingly, Weber subscribes to an idealistic theory of legitimacy positing the primacy of ideas as well as their autonomy. But Weber's differentiation of types of domination with respect to legitimacy is always counterbalanced in his concrete studies by a differentiation according to the particular structures of the administrative staff. In addition, Breuer criticizes Weber's ruler-centered perspective, which provides no systematic account of the socio-economic genesis of structures of domination. But Weber's approach is organization- rather than society-centered. It does not proceed from structures and processes, but from a closed administrative system. Although Weber includes external phenomena in his sociology of domination, he has no way of relating the structural mode of domination with structural features of the social environment. According to Breuer, the analysis of society from a ruler perspective must also examine socio-economic modes of domination.

Breuer includes not only the theory of bureaucracy, but also the sociology of law and other matters in Weber's theory of rational domination. He makes clear that the rational features of domination cannot be seen as an institutionalization of purpose-rationality. Rational domination cannot be explained in terms of conscious agency; rather, its structures should be viewed as structures *sui generis*. Here "rational" refers to two main features in Weber's sociology of domination. First, rational domination implies the institutionalization of voluntarism, i.e., that every norm — and the whole legal order — is positive, imposed and can always be changed. Second, rational domination means that the positive order is systematized and standardized. The emergence of this form of domination is due to formal juridical rationalism and the lawyers interests. However, it also has to do with the fact that the bourgeoisie supported the dissemination of rational law. Although he discusses the close relation between the money form, the commodity form and rationality, Breuer establishes only an indirect relation between capitalism and state building.

Against critics of Weber's theory of legitimacy *qua* legality, Breuer shows how rational bureaucratic domination is made possible by this form of domination. The domination of an impersonal, legal order functioning like a rational machine presupposes already organized people. Discipline through the universalization of bureaucratic practices in all spheres — especially in the work place — produces the disciplined individual. The realization of rational bureaucratic domination depends on the ability of the subjects to internalize the ruling order, to instrumentalize oneself and to identify with the prevailing function.

Following Weber, Breuer also prefigures the future developments of rational domination. Due to the return of material values and the decisionistic re-orientation of jurisprudence, the law is losing its formal character. This loss of formal rationality weakens the law's binding power, which ultimately leads to the

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bureaucratic apparatus becoming autonomous: the bureaucratic state can now program itself. Furthermore, the execution of political decisions shows a decline in the monocratic structure of rational domination. According to Breuer, domination is declining as a defining feature of advanced industrial societies, since bargaining strategies and informal consensus processes between the administration and its environment can no longer be understood in terms of the control paradigm of predominant theories of bureaucracy. Thus a cooperative bureaucracy which replaces hierarchical processes with exchange and consensus strategies in dealing with nongovernmental, private organizations transcends Weber's concept of rational domination. For Breuer, the days of rational political domination are numbered. Thus Weber's theory of legal, bureaucratic domination has only a very limited use for multi-centered and "heterarchic" contemporary societies.

Breuer's diagnosis of the "withering away of the state," however, is not entirely unproblematic. If modern society is described in terms of network-building, discourse-models and exchange-relations, this does not mean that structures of domination have disappeared. Political sociology has always been weary of prevailing interpretations and has always sought to locate existing power struggles and new relations of domination. Thus there may be a gap between the actual political structures and current theories about them. Furthermore, seeing the state in terms of relations of domination and violence does not entail that it is the center representing society as a whole. Weber's notion of the state does not see it as the top of a social hierarchy. In addition, Weber does not reduce the state to a single, commanding subject. In his sociology, the state is like modern capitalism: an impersonal structure of domination which follows its own internal logic, regardless of the will of any particular subject.

That the state bureaucracies bargain with autonomous subjects and organizations is obvious. But this is only true in areas such as education, social and welfare programs, environmental problems, etc. Where the very core of the state is at stake, as in internal and external security matters or guaranteeing "law and order," the picture is somewhat different: the police and the army do not argue or bargain. Thus bargain and consensual strategies take place in the *Leviathan*'s shadow. Domination and the monopoly of violence are the precondition for exchange, bargaining, and consent strategies. At any rate, exchange and consensus are not alternatives to domination; they are simply different means of state control. Therefore, the state is not withering away but only enhancing its regulatory instruments. As long as there are armies, police, prisons, judiciary systems and administrations, there will be structures of domination. Especially in these fields, there has been an increase in the state's political power, its surveillance, supervision and control ability. Despite all of these criticisms, both Anter's and Breuer's books offer brilliant interpretations and further elaborations of Weber's sociology of the state.

Eckard Bolsinger

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The Best of All Possible Worlds

Max Singer and Aaron Wildavsky, *The Real World Order*, revised edition (Chatham, N.J.: Chatham House Publishers, 1996), 224 pp.

An increasingly prevalent practice in defending current concepts of democracy is to make it synonymous with Americanization. Creating a world order permeated by the economic and cultural values of contemporary Western elites is taken to be equivalent to promoting a democratic future for everyone in *The Real World Order* — a work by two futurologists, Max Singer and Aaron Wildavsky, praised by such global democratic advocates as Robert O. Keohane, Francis Fukuyama, Bruce Bueno de Mesquita, and by the *Times Literary Supplement* for its "injection of sensible balance into discussions of international relations." Singer and Wildavsky explain that although "democracy and modern wealth are new in the world," they have now come to define the major economic and political powers. Today these countries form a "zone of democracy and peace," which has removed the likelihood of truly devastating international conflicts. The authors look forward to the worldwide "spread of wealth, democracy, and peace," "by about a century from now," but they believe that the democracies led by the US must take action in "reinforcing the current trends" and "limiting the damage from the turmoil of transition."

Less interesting than their proposals to bring the non-democratic world into the circle of grace are the questions Singer and Wildavsky fail to clarify. They define democracy, for the most part, by pointing to the affluence and advancing medical technology of the Western and Westernized world. Allegedly, the US is the only democracy that has been one "from the beginning." But as other countries adopt democratic institutions, "there can be peace without a peacekeeper." "So long as we and they stay democratic, there will be no threat of war among us." Democracies, by definition, are peaceful and, as countries assume this "political character," they supposedly abandon their warlike past. Thus the Germans and Japanese were partly inoculated against their militaristic and authoritarian histories by having themselves "reconstituted" by occupying armies, and "when Mexico becomes democratic, it will be part of the North American zone of peace and democracy." Moreover, "when all the countries of Central America . . . are democratic, Central America will be added to that zone."

Unfortunately Singer and Wildavsky cannot discuss the idea of democracy without exalting the hegemony of democratic powers and a consumerist economy. The reason is not that they are reckless imperialists. At one point they concede that they are primarily talking about a development in which political forms may be attendant to economic modernization. They also consider the argument of

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the Islamicist Elie Kedourie that countries, no matter what their forms of government, will fight over interests. Despite institutional similarities, peoples and states "will covet the same possessions or advantages for (as they see it) the best possible reasons." Singer and Wildavsky believe this may happen up to a point, but that democracies will still be more reluctant to fight over political differences than nondemocratic states.

The authors repeatedly suggest that democracies are peaceful because they are commercial societies and because democratic governments must contend with popular opinion. They also eschew a simplistic generalization popular among other democracy boasters: that democracies have never gone to war against each other. Singer and Wildavsky avoid generalizing about the past and explicitly identify their notion of democracy as something new, though they also contend that the US has always been politically what it is now. What they cannot do is avoid making democracy mean whatever American proselytizers and those who follow their example claim about themselves. The expanding "zone of peace and democracy" is the assumed point of reference for learning what democracy means or does not mean. And that zone is associated with conditions that may not have arisen from specifically democratic institutions, e.g., industrial capitalism, cumulative medical breakthroughs, or the Protestant work ethic.

To the claim that such cultural and economic preconditions could only have developed in democratic societies, there is an answer at hand: as Wildavsky and Singer properly observe, what is being described is "new in the world." It is not merely an extension of an older society leading up to the present. This does not mean that societies associated with the "zone of peace and democracy" were not in some cases predisposed toward the new order. But this was not true in all cases, and Singer and Wildavsky stress the transformational character of what they describe.

Significantly, the revolutionary nature of this order is not fully conveyed by the one sketchy and vague definition of democracy provided by the authors near the beginning of their tract: "A country is a democracy for our purposes if its political system works in a way that reflects popular consent (thus giving those who suffer from war the power to prevent it), trains political leaders to think in terms of political forms of conflict, and gives people a sense of kinship with other democracies." The "for our purposes" qualification indicates an impatience with having to define what should be clear to everyone, but is not to this reader. The one example of "popular consent" the authors cite would have disqualified the US as a democracy from the Civil War through the Bosnian police action, i.e., whenever the federal government has undertaken belligerent actions in opposition to majority opinion. Perhaps the training that Wildavsky and Singer wish to give political leaders in preparation for "political forms of conflict" may include devising ways of bringing one's fellow citizens into particular struggles. As for "kinship with other democracies," this seems more like a visionary proposition than a

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characterization of the way popular governments have behaved over the centuries. Why should peoples with democratic political forms base kinship on this particular act and not on other cultural considerations? Is it "undemocratic" for the Irish to think of themselves as Catholic, Celtic, or European more than as soul mates of democratic India or of the incipiently democratic Ivory Coast? Indeed, why should democracies, as governments based on popular consent, build a global ideology around this situation?

The answer, for the authors, is obvious, but has little to do with any older practice of democracy. Whatever Singer and Wildavsky imagine to be good is subsumed under "democratic" and treated as historically triumphant. Democracy is the here and now projected into the future and declared inevitable. It is also the idealized present that Singer and Wildavsky associate with their hopes. They speak of waning "statist delusions" at a time when most Western administrative states are absorbing, on average, higher and higher percentages of disposable income. The growing Western public sector is somehow offset by the denationalization the authors find in the former Soviet empire. It is also possible for them to speak broadly of a growing tolerance of intellectual dissent from trends in Eastern Europe. But this observation glides over the fact that "crimes of opinion" have become punishable offenses in Western countries. Laws against speech thought to diminish the self-esteem of ethnic and religious minorities and those of different sexual orientation now exist and are being enforced in Canada, France, Great Britain, and Holland. The fall of Communism has not expanded the "zone of peace and democracy" in what is described as the heartland of that zone.

Singer and Wildavsky announce that "competitive subnational units" will typify the new democratic order: "A democratic England and a democratic Scotland no longer need to have a common government to avoid endless wars with each other. Countries in the zone of peace no longer have to be large to protect themselves against attack." But this has not happened in most Western managerial democracies. These governments, in fact, have become more centralized in the modern age. And this centralization has occurred not because of the fear for security which the authors attribute to pre-democratic societies, but because managerial states are bureaucratically expansionist. Since mid-century, they have also been devoted to wide-scale social change. To whatever extent "we can expect old 'provincial' units and suppressed nationalities to seek greater recognition" in Western and Central Europe, this will likely occur for reasons other than those offered by the authors. It will result from the confrontation between the current brand of democracy and a populist revolt. Devolution of power will not be a natural progression from the zone of democracy which now exists. It represents a countertrend, which the media has identified with racism, xenophobia, and a still unconquered "undemocratic" past.

What Singer and Wildavsky confuse with the recognition of regional claims is really the attempt by supranational agencies — e.g., the European Parliament

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— to subvert national authorities. The authors, putting a different light on this situation, look forward to the reassertion of regionalism within a world dominated by a "caucus of democratic powers." Never does it dawn on them that any supranational structure of "democratic" values-enforcement will not be likely to encourage regional or communal diversity. It will accelerate the managerial consolidation that is already shifting power from smaller to larger units of political and social control. And it will leave undisturbed the practice by which this process is called "democratic."

While any comprehensive analysis must note the electoral successes achieved by some separatists, such as the vociferous Northern League, the modern administrative state continues to be the dominant model of political organization. That model has favored broad centralizing trends within and above national states since at least the 1960s. State managers have gone from economic to social planning and recently to the therapeutic reconstruction of their citizen-subjects. In the American part of the "zone of peace and democracy," almost all regional opposition to the larger trend of consolidation remains weak. And though populist resistance to centralization flares up in the US, it increasingly lacks a regional base. It is usually sporadic, based on tax issues or linked to the religious Right. In Quebec, the separatists seek to impose the French language but seem less and less to represent a distinctive cultural and political identity. A largely secularized welfare-state society, Quebec is much the same as other Canadian provinces, heavily staffed by public administrators and members of the therapeutic class. It illustrates, though not as they would want, the proud vision of Singer and Wildavsky: in the new world order political units, even those which seek to break off from larger ones, will sometimes look remarkably similar to what they reject. What can be debated is whether any of them, in the absence of other changes, will be practicing self-government.

Paul Gottfried

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